TABLE OF CONTENTS.

OPINION OF WHICH REVIEW IS SOUGHT, adjudicating antitrust damages, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp. (formerly Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer* (7 C.A., 1970), 429 F.2d 873 1

JUDGMENT OF WHICH REVIEW IS SOUGHT, entered June 26, 1970 23

ORDER DENYING REHEARING, entered September 15, 1970 24

OPINION OF THE DISTRICT COURT, entered by Judge Decker, affirmed in the judgment of which review is sought 25

JUDGMENT ENTERED BY THE DISTRICT COURT, Judge Decker, and affirmed in the judgment of which review is sought 31

FINDINGS OF FACT AND CONCLUSIONS OF LAW entered by Judge Miner in the original action, finding antitrust violation 34

JUDGMENT ENTERED BY JUDGE MINER in the original action adjudging antitrust violation 47

OPINION OF THE COURT OF APPEALS affirming Judge Miner's decision, adjudging antitrust violation, *Switzer Brothers, Inc., Robert C. Switzer v. Locklin and Brant, d/b/a Radiant Color Company* (7 C.A., 1961), 297 F.2d 39 51

OPINION OF WHICH REVIEW IS SOUGHT.

430 F.2d 873

(Dated June 26, 1970.)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

SEPTEMBER TERM AND SESSION—1969

No. 17730 and No. 17731

HARRY P. LOCKLIN and ELMER J. BRANDT, d/b/a RADIANT COLOR COMPANY,

Counter-Plaintiffs, *Appellees and Cross-Appellants*,

vs.

DAY-GLO COLOR CORPORATION (formerly SWITZER BROS., Inc.),

ROBERT C. SWITZER, and JOSEPH L. SWITZER,

Counter-Defendants, Appellants, and Cross-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before SWYGERT, *Chief Judge*; KILEY, *Circuit Judge*; and GRANT, *District Judge*.*

GRANT, *District Judge*:

INTRODUCTION

In these cases, Day-Glo Color Corporation, et al., (hereinafter "Switzer") appeal, and Locklin and Brandt (hereinafter "Radiant") cross appeal, from the district court's judgment. We affirm.

---

* District Judge from the United States District Court for the Northern District of Indiana, sitting by designation.

HISTORY

The parties compete in the daylight fluorescent materials market. The two types of product involved are liquid colors (variously known as silk screen colors, wet colors, paint, and ink) and paper coated with fluorescent colors.

On 30 October 1948 Switzer began its United States licensing program, the first successful step in the commercial exploitation of patent rights, culminating fifteen years of preparatory work. Radiant, after two years of preparation, entered the business on 1 January 1949.

On 5 June 1952 Switzer began this case in the district court as a patent infringement suit against sixteen of Radiant's customers, including the Chicago Cardboard Company. Seven months later Radiant was allowed to intervene as a party defendant and on 19 February 1954, after this court reversed the district court's denial of leave,[1] filed an anti-trust counterclaim charging violation of 15 U.S.C. §§ 1, 2, and 14.

Several years later Switzer encountered rough going in its similar patent infringement suit against another Radiant customer in Ohio. The Ohio suit was dismissed for failure to join indispensable parties, co-owners of the patent in issue.[2] The court below gave Switzer the same treatment in the Illinois suit and we affirmed. *Switzer Bros., Inc. v. Chicago Cardboard Co.*, 252 F.2d 407 (7th Cir. 1958).

The cause now before us then went to trial on Radiant's amended counterclaim and Switzer's counterclaim against Radiant, culminating in the 12 August 1960 judgment that Switzer, without malice or bad faith, violated

---

[1] *Switzer Bros., Inc. v. Locklin*, 207 F.2d 483 (7th Cir. 1953), cert. denied, 347 U.S. 912 (1954).

[2] *Switzer Bros., Inc. v. Byrne*, 130 F. Supp. 788 (N.D. Ohio 1955), aff'd. 242 F.2d 960 (6th Cir. 1957).

the anti-trust laws. Switzer's counterclaim was dismissed for lack of evidence. We affirmed.[3] The district court, on 14 June 1962, referred the case to a special master to report on damages as enumerated in the findings,[4] costs expended, and the amount of reasonable attorney fees.

The master began hearing evidence on 31 March 1964. Subsequently Radiant was rebuffed by the district court in its effort to file a supplemental counterclaim on the ground that the issues sought to be raised had been litigated elsewhere. We affirmed the district court's denial of leave to file the supplemental counterclaim.[5]

---

[3] *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962).

[4] The findings, in pertinent part, read:

29. Radiant . . . has been directly damaged by . . . Switzer . . . in the respects noted in Findings 30 to 34 below, and possibly in others.

30. Commencing in 1959 and continuing until late in 1963, Radiant was put to expense in counteracting the Switzer propaganda and in reassuring dealers and customers that the Switzer program could not prevent the use of Radiant's products.

31. Commencing on June 5, 1962, and continuing until February 11, 1963, Radiant was put to the expense of defending its customer, Chicago Cardboard Company, by virtue of the complaint filed in this action.

32. Commencing on February 9, 1963, and continuing until April 8, 1967, Radiant was put to the expense of defending its customer, James P. Byrne, in the Northern District of Ohio, Eastern Division.

33. Commencing shortly after June 5, 1962, Radiant's market in Velvo-Glo paper became depressed due, at least in part, to the commencement of the instant action, and Radiant has lost profits which it otherwise would have made.

34. Commencing shortly after February 9, 1963, Radiant's market in Velvo-Glo silk screen colors became depressed due, at least in part, to the commencement of the Cleveland suit, and Radiant has lost profits which it would otherwise have made. (Emphasis added.)

[5] *Locklin v. Switzer Bros., Inc.*, 335 F.2d 331 (7th Cir.), cert. denied, 379 U.S. 962 (1964), rehearing denied, 380 U.S. 926 (1965).

Six years after the reference, during which time forty-three days were spent in presenting evidence and argument, the master filed his report of over two hundred and thirty-one printed pages, based upon nine thousand pages of documents and testimony concluding that Radiant was damaged in the amount of $1,145,378.73.[6] Over objection, the district court entered judgment for that amount. The parties, for the fifth time, appeal here.

STANDARD OF REVIEW

The parties are entitled to a real review to determine whether or not the factual findings are clearly erroneous. *Becker v. Loew's, Inc.*, 133 F.2d 889 (7th Cir.), *cert. denied*, 319 U.S. 772, *rehearing denied*, 320 U.S. 811 (1943). Although the master's findings of fact are binding on the district court unless clearly erroneous, Rule 53(e)(2), FED. R. CIV. P., that rule is not "an invitation to abdicate the judicial function upon receiving a master's report." *Krinsley v. United Artists Corp.*, 225 F.2d 579, 583 (7th Cir. 1955). It is incumbent upon us to determine whether or not the district court correctly applied the clearly erroneous test to the master's findings of fact.

THE CROSS APPEAL

Radiant, on cross-appeal, raises two issues. First, we are asked to decide that the judgment, expressed in dollars, is erroneous for lack of an upward adjustment

---

[6] The breakdown by the "findings" set out in Note 4, *supra*, was:

Finding 30	$ 7,777.41 trebled
Finding 31	30,000.00 trebled
Finding 32	4,359.50 trebled
Finding 33)	314,656.00 trebled
Finding 34)	
Attorney Fees	75,000.00

equivalent to the inflationary shrinkage occurring since the 1950's, the time during which damage was actually sustained, until the entry of judgment.

There are some cases where inflation was considered as a factor in assessing damages, see *e.g.*, *Waterman S.S. Corp. v. Dean*, 171 F.2d 408 (4th Cir. 1948), *cert. denied*, 337 U.S. 924 (1949) [salvage]; many cases where dollar value is simply ignored, see *e.g.*, *Bates v. United States*, 108 F.2d 407 (7th Cir. 1939), *cert. denied*, 309 U.S. 666 (1940) [tax refund suit]; and a host of cases where inflation is used to demonstrate why a trial court committed no error in refusing to order a remittitur when a damage award, compared to past cases, seems high, see *e.g.*, *Virginia Ry. v. Rose*, 267 F.2d 312 (4th Cir.), *cert. denied*, 361 U.S. 837 (1959) [personal injury]. We are unable, however, to find any authority requiring, or even allowing, the increase of a damage award, *once found*, to offset the decreased value of the dollar.

Nor can Radiant successfully contend that the master erred in failing to consider inflation to arrive at the damage figure on the ground that this is customary in other types of "tort" situations and that the lack of a consumer price index adjustment deprives it of property without due process of law. Both of these arguments can be met with the single observation that Radiant's 1950 economic losses, awarded in 1960 dollars, were trebled.[7]

Radiant next asks that interest run, not only from the date of judgment, 13 March 1969, but also from the date the master's report was filed, 3 June 1968. Interest is not

---

[7] It strikes us that Radiant is here asking for a favored position — an insured against inflation — devoid of attendant risk. As the master aptly noted: "While we all agree [that today's dollar is not the same thing as yesterday's] none of us can say that tomorrow's dollar may not equal yesterday's — whatever the odds may be at the moment."

enumerated as a recoverable item in the statute, 15 U.S.C. § 15. Recovery of it is therefore precluded. *Cf. Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).[8] Radiant is then relegated to the general interest statute, 28 U.S.C. § 1961, which allows interest on a money judgment only from its entry date. The judgment on cross appeal must be affirmed.

THE APPEAL

Switzer presents five main points in support of its position that the judgment must be reversed, in whole or in part.

A. *The Settlement*

Radiant brought a suit similar to this one in California on 21 October 1955 charging Switzer, Sherwin-Williams, one of its subsidiaries, and another, with conspiracy to violate the anti-trust laws. The case was terminated by the granting of Radiant's motion to dismiss on 25 August 1960. Switzer says that Radiant should have no damages here because the latter released its claim against Sherwin-Williams in the California conspiracy suit without a reservation of rights against remaining tortfeasors who committed the same tortious acts,[9] even if they were not

---

[8] This is quite unlike the patent statute, 35 U.S.C. § 284, which provides for damages "together with interest . . . ."

[9] *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83 (5th Cir. 1968); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc.*, 351 F.2d 925 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *Dura Elec. Lamp Co., Inc. v. Westinghouse Elec. Corp.*, 249 F.2d 5 (3d Cir. 1957); *Calif. Concrete Pipe Co. v. American Pipe & Constr. Co.*, 288 F. Supp. 823 (C.D. Cal. 1968); *Solar Elec. Corp. v. General Elec. Co.*, 156 F. Supp. 51 (W.D. Pa. 1957); *Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc.*, 132 F. Supp. 921 (S.D.N.Y. 1955); *Rector v. Warner Bros. Pictures, Inc.*, 102 F. Supp. 263 (S.D. Cal. 1952).

sued,[10] even if no written release were signed,[11] and regardless of plaintiff's intent.[12]

Reliance is had upon the following facts, as found by the master: The California conspiracy suit involved the same wrongs here asserted, Sherwin-Williams would do no business with Radiant until the law suit was dismissed, the former making it clear that a one-year supply contract for Radiant's pigments would be waiting upon dismissal, Radiant dismissed the suit "in anticipation" of the supply contract, and the contract was executed.

The record, however, reveals at least two additional critical facts, *viz.*, Locklin denied any settlement agreement, and the supply contract was the third in a series. This sufficed, as both the master and the district court noted, to put the matter in dispute.

Switzer of necessity must argue that the facts surrounding dismissal of the California suit show, as a matter of law, that the dismissal was the quid pro quo for the supply contract. Put another way, that the supply contract was the satisfaction for the wrongs Radiant alleged it suffered. The facts, of course, show no such thing. Switzer's conclusion is merely an inference to be drawn from the facts. The master, on both direct and circumstantial evidence, drew another inference—that while Radiant hoped to get the Sherwin-Williams contract, its dismissal of the California suit was not the consideration

---

[10] *Dura Elec. Lamp Co., Inc. v. Westinghouse Elec. Corp.*, *supra*, Note 9; *Solar Elec. Corp. v. General Elec Co.*, *supra*, Note 9.

[11] *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Dist. Corp.*, 358 F.2d 432 (9th Cir. 1966).

[12] *De Hart v. Richfield Oil Corp.*, 395 F.2d 345 (9th Cir. 1968); *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theater, Inc.*, *supra*, Note 9.

therefor. The master's factual determination was not clearly erroneous, and we must affirm on that basis, having no need, therefore, to pass on the validity of the legal propositions urged by Switzer.

B. *Treble Damages*

Both the district court and this court have found that Switzer's anti-trust violation was without malice or bad faith. *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39, 49 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962). Although the controlling statute says that one injured by reason of an anti-trust violation "shall recover threefold the damages by him sustained . . . ," 15 U.S.C. § 15, Switzer asserts that it was error to treble damages here. Reliance is had upon two cases, *Rogers v. Douglas Tobacco Bd. of Trade, Inc.*, 244 F.2d 471 (5th Cir. 1957), *cert. denied*, 361 U.S. 833 (1959) and *Haskell v. Perkins*, 28 F.2d 222 (D.N.J. 1928), *rev'd on other grounds*, 31 F.2d 53 (3rd Cir.), *cert. denied*, 279 U.S. 872 (1929), both of which hold that damages need not be trebled in every case. *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284 (7th Cir. 1954) holds that anti-trust damages must be trebled. We are asked to reassess *Sun Theatre* and hold that the statute does not require the trebling of damages "willy-nilly".

Both *Rogers* and *Haskell* involved anti-trust suits against defendant estates. The courts there were reluctant to fashion punitive sanctions upon the representatives of a tortfeasor who could not be "rehabilitated" or offered as a deterrent example. There was no personal representative in *Sun Theatre* nor is there one here. The cases are clearly distinguishable and thus present no conflict in need of resolution. To the extent that *Sun Theatre* con-

flicts with *Rogers* and *Haskell*, we adhere to our *Sun Theatre* decision on this issue. The trebling of the damages found to have been incurred was not error. It was required by law.

C. *Excessive Attorney Fees*

Switzer next complains of the attorney fees award, characterizing it as excessive. Attorney fees account for $198,201.00 of the total award, approximately $7,700.00 for combating propaganda, $30,000.00 for defense of the complaint filed herein, and $75,000.00 for prosecuting the counterclaim to judgment.[13]

The fees awarded for combating propaganda is said to be excessive except for $1,200.00 because it was based on schedules made up a decade after performance of the services. We know of no rule which requires the master to make a finding only on contemporary records and in any event the schedules relied upon were compiled from contemporary records.

Switzer next argues that $30,000.00 is too much for defending the complaint because it was dismissed for failure to join an indispensable party and adequate records were not preserved.

Radiant quite correctly points out that this case proceeded on the patent infringement complaint for more than four years before it was dismissed. During this time Radiant was preparing for a full-scale lawsuit. It finally learned, quite by accident, and despite previous requests for and denial by Switzer, of documents revealing that there were other non-joined owners of the patent. It will not do for Switzer to now contend that Radiant should

---

[13] The awards for combating propaganda and defending the complaint were trebled under 15 U.S.C. § 15.

have done nothing to prepare its defense against the former's patent infringement claims because it could have waited for evidence to support a motion to dismiss. The delay and expense was owing to Switzer. It must now pay the price.

Any argument that there is insufficient proof to justify the award is simply without merit. The fact that Radiant did not keep exquisitely detailed records cannot be cause for complaint when the records produced would have justified an award in excess of $50,000.00. $30,000.00 was reasonable and not clearly erroneous.

Undaunted, Switzer assails the $75,000.00 award for prosecuting this counterclaim on the grounds that it is excessive, unsupported by contemporary records, constituted compensation for effort spent on unnecessary issues, and that it is barred by Section 4 of the Act, 15 U.S.C. § 15, because Radiant's attorney worked under a contingent fee contract.

We think the award not excessive. It was adequately supported by documentary evidence and, although we might say as a matter of hindsight, that some of the legal services now appear to have been unnecessary, we would be hard put to characterize them as manufactured damages.

Farmington Dowel Products Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969) holds that a contingent fee arrangement bars an award of attorney fees under Section 4 of the Act. It is sufficient to note that both this court, *cf. Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952), and the First Circuit Court of Appeals, *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969), *reversing in part*, 297 F. Supp. 924 (D. Me. 1969), disagree. The attorney fees award was proper.

D. *Lost Sales*

The largest items of damage found by the master were Radiant's losses of net profits.[14] Switzer, understandably, makes a furious attack on both the lost sales and rate of profit figures. Turning to the first element, the lost sales figure, Switzer gives five reasons why the master's determination thereof is unsupportable. They are: 1) Radiant did not meet its burden of proof; 2) Switzer did not cause Radiant to lose sales; 3) lost sales should not have been computed for certain years; 4) it was error to use *gross* instead of *net* sales; and 5) Radiant's experts made estimates which are beyond redemption.

1. *The Burden of Proof.* Obviously a case such as this does not admit of precise proof. Radiant was attempting to prove sales it did not make. To be sure a finding may not rest on guess or speculation, *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Assoc. Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965). On the contrary, a plaintiff must prove the amount of damages by a preponderance of the evidence. Such proof need not be direct but may, instead, be circumstantial, *Keough v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), even to the point of estimates based upon assumptions, provided that the assumptions rest upon an adequate base, *Herman Schwabe, Inc. v. U. S. Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). Damages may not be awarded on the basis of conjecture and speculation and the admitted fact of damage is insufficient to prove the amount of damage, *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565 (S.D. Ind. 1958), *rev'd on another*

---

[14] See Note 6, *supra*.

issue, 270 F.2d 616 (7th Cir. 1958), *cert. denied*, 361 U.S. 967 (1960). A plaintiff may not shift the burden of proving the amount of damage simply because a defendant "by his own wrong has precluded a more precise computation of damages." *Assoc. Press v. Taft-Ingalls Corp.*, *supra* at 769.

It must nevertheless be kept in mind that a treble damage plaintiff seeking recovery for market exclusion cannot provide detailed, concrete, and precise proof, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). The fact finder may act on probability and inference. Any other rule would only induce the wrongdoer to inflict more grievous injury, thus immunizing himself from liability by causing the amount of damages to be uncertain, *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 (1946). The law has not set down any mechanical test or formula as regards the required proof, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), lest the rigid statement of the rule provide the very means to escape its sanction. Rather the courts have been liberal in designing rules of proof with respect to the amount of damages when the fact of damage, as here, is clearly established, *Howard Industries, Inc. v. Rae Motor Corp.*, 293 F.2d 116 (7th Cir. 1961). Even though we may not agree with each step in the master's reasoning process, we must affirm, *Edgewood American Legion Post No. 448 v. United States of America*, 246 F.2d 1 (7th Cir. 1957), unless the findings are beyond the pale of sane judgment. *Cf. Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942). A finding is not clearly erroneous unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

been committed." *United States of America v. United States Gypsum Co.*, 333 U.S. 364, 389 (1948).

A perusal of the relevant portions of the record firmly convinces us that the master's findings are not clearly erroneous. That there are conflicts in the evidence and wide room for argument shows only that permissible conclusions were drawn. "[A] choice between two permissible views of the weight of [the] evidence is not 'clearly erroneous'." *United States of America v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). The evidence offered by Radiant, while not conclusive, was the best attainable under the circumstances and clearly sufficient. Switzer, under the guise of questions of law, argues about the weight of the evidence.

2. *The Cause of Radiant's Loss.* Switzer contends that the master erred in determining lost sales because the loss was due, not to Switzer's acts, but Radiant's own "massive product problems." As regards the first product category, silk screen colors, the record shows that Radiant limited its market, did not offer silk screen until the third year of the damage period, had no intent to enter the silk screen market, produced a defective product which had to be withdrawn, finally produced acceptable silk screen but it was inferior to Switzer's, and later achieved product equality with Switzer but only by infringing the latter's patent.

With respect to the second product category, coated paper, the record shows that Radiant was without competition for the first three years of the damage period, lost part of the market due to a third party competitor which had a better product and distribution system complemented by lower prices, recaptured some of the market only by infringing on patents, and strained its production

facilities to the breaking point, resulting in customer complaints and order cancellations for late delivery which further deteriorated its distribution network.

If the master allowed Radiant damages for losses which were not caused by Switzer, reversal is required. Causation, between an anti-trust violation and damage sustained, must be shown.[15]

This, however, is only Switzer's side of the story. The master also heard Radiant's tale of woe. He concluded, in effect, that Radiant demonstrated power to grow when unmolested by Switzer's periodic anti-trust activity; Switzer's unlawful acts deprived Radiant of market experience which further damaged them by instilling a reasonable fear of pursuing aggressive market policies, and that Radiant was required to allocate a large measure of both its economic and human resources to the fight for survival rather than the struggle to improve.

Switzer's argument on this point has three basic flaws. It attempts to view the evidence from the point of view most favorable to it. Next, it has tried to work a radical separation between the two product categories involved. Finally, it urges a restrictive view of causation which traces Radiant's product problems only to the very im-

---

[15] *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); *Gorham & Johnson, Inc. v. Chrysler Corp.*, 308 F.2d 462 (5th Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); *Siegfried v. Kansas City Star Co.*, 298 F.2d 1 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962); *Sunkist Grower's, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rehearing denied*, 289 F.2d 933 (1961); *rev'd on other grounds*, 370 U.S. 19 (1962); *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Dipson Theaters, Inc. v. Buffalo Theaters, Inc.*, 190 F.2d 951 (2d Cir. 1951), *cert. denied*, 342 U.S. 926 (1952); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *A. C. Becken Co. v. Gemex Corp.*, 199 F. Supp. 544 (N.D. Ill. 1961), *aff'd*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963).

mediate, albeit plausible, origins. The master, however, traced Radiant's debility back to its roots. Switzer may not thus "lawlessly clip [Radiant's] wings and escape liability . . . on the plea that [Radiant] could not fly." *L. P. Larson, Jr., Co.* v. *William Wrigley, Jr., Co.*, 20 F.2d 830, 831, (7th Cir. 1927), *rev'd on other grounds*, 277 U.S. 97 (1928). Otherwise "the more flagrant . . . the invasion of another's rights, the more certain and complete would be the invader's immunity." *Id.* at 832. The master was correct in determining that Radiant's lost sales were "caused" by Switzer.

3. *Computation for Certain Years.* The master computed Radiant's lost sales on silk screen and coated paper from 1 January 1949. Switzer argues that a prior adjudication by the district court in this case bars recovery for lost paper sales prior to 5 June 1952, and for lost silk screen sales before 9 February 1953. The original decision before us in 1961 establishing liability found that Radiant had been injured in certain enumerated respects "and possibly in others."[16] Among the enumerations were findings that Radiant was injured in the sale of its coated paper after 5 June 1952 and injured in the sale of its silk screen after 9 February 1953.[17] The question presented is whether these findings constitute definitive holdings that Radiant sustained no lost sales of those items before the respective dates.

Before entry of these findings, Radiant requested the district court to find that its normal growth was forestalled by Switzer commencing on 1 January 1949. The request was rejected. On appeal, Radiant complained of the court's finding 29 on the ground that it did not

---

[16] Finding No. 29. See Note 4, *supra*.

[17] Findings No. 33 and 34, respectively. See Note 4, *supra*.

specifically indicate that Switzer had forestalled its normal growth. We rejected the plea, pointing out that the decree did not purport it limit the scope of inquiry at the damage hearing and concluded that "[s]ince [Radiant] is not restricted in the scope of its proof before the master, it has no cause to complain that finding 29 might have been more specifically cast." *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39, 49 (7th Cir. 1961), *cert. denied*, 369 U.S. 851 (1962).

The master correctly reasoned that if finding 29 did not purport to limit the scope of inquiry as to the amount of damages, and that if he was to report on the amount of damages incurred, and if Radiant's complaint that finding 29 was not specific enough and was meritless because it was not restricted in the scope of its proof, then no final adjudication precluded the finding of lost sales from 1 January 1949. We agree with the district court —Switzer's interpretation of the findings seems strained.

4. *The Use of Gross Sales.* In determining Radiant's lost sales, the master used gross sales for the first six years of the damage period, switching to net sales for the last two years. Net sales would have excluded six types of items—credits, returns, allowances, products other than daylight fluorescent products, government sales, and foreign sales. The reasons advanced to show reversible error are that the parties agreed to put sales on a net basis, authority, both legal[18] and accounting, condemns

---

[18] *Garcia v. Mountain States Telephone & Telegraph Co.*, 315 F.2d 166 (10th Cir. 1963); *Wolfe v. Nat'l Lead Co.*, 255 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); *L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), *rev'd on other grounds*, 277 U.S. 97 (1928); *2361 State Corp. v. Sealy, Inc.*, 263 F. Supp. 845 (N.D. Ill. 1967); *Vendo Co. v. Stoner*, 105 Ill. App.2d 261, 245 N.E.2d 263 (1969); *Snelling & Snelling of Mass., Inc. v. Wall*, 345 Mass. 634, 189 N.E.2d 231 (1963); *Henry's Drive-In, Inc. v. Anderson*, 37 Ill. App.2d 113, 185 N.E.2d 103 (1962).

the use of gross sales figures, and the use of gross sales had a compounding effect which increased the judgment by $275,328.

Switzer's citation to the record does not support the assertion that the parties agreed or stipulated to put sales on a net basis. Nor is its legal authority in point. Switzer's cited cases condemn an award of damages for loss of gross as opposed to net *profits*. To the extent that any reference is made to gross versus net *sales*, the only directive is that gross earnings must be related to net profits. See *Garcia Mountain States Telephone & Telegraph Co.*, 315 F.2d 166 (10th Cir. 1963). Radiant's net profits were related to its gross sales. Moreover, some cases explicitly recognize the appropriateness of *considering* gross sales in determining a loss of net profits, see *A. C. Becken Co. v. Gemex Corp.*, 199 F. Supp. 544 (N.D. Ill. 1961), *aff'd*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963) [lost profits]; *L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), *rev'd on other grounds*, 277 U.S. 97 (1928), [accounting]. The master did no more than that. His determination was that Switzer's net sales point was, *per se*, without merit. In other words, he considered the argument as going to the weight of the evidence. The master later scaled down the rate of return figure in a deliberate attempt to give Switzer's net sales point some effect. In this respect, as indeed throughout his report, the master took an extremely conservative approach, giving Switzer the benefit of any doubt. No just cause for complaint has been shown. The master's findings were within the range of permissible judgment. *Edgewood American Legion Post No. 448 v. United States of America*, 246 F.2d 1 (7th Cir. 1957); *Adventures in Good Eating v. Best Places to Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942).

5. *The Expert Testimony.* Switzer next presents us with elaborate calculations and citation to the record to show that Radiant's experts were not qualified to project lost sales, that their factors were arbitrary, that certain grievously incorrect assumptions were made which even the master implicitly rejected unawares, that the figures are absurd because they indicate that Radiant's damage was inversely related to the time of the anti-trust violations, that Radiant's contemporary appraisal of the situation radically conflicts with the master's findings, that the master took his pick of the evidence without rhyme or reason, that he even went so far as to fill gaps in the evidence by relying on his own expertise to pick figures out of the air because he assumed that he was obligated to find damages and, finally, the award indicates that for certain years Radiant would have had more sales than Switzer but for the latter's wrongful acts.

In any proceeding as long and as involved as this one, it is possible to pick away at the details and find numerous flaws and inconsistencies. Switzer has zealously explored every one. But in appellate review, our function is broader. We look to the entire record.

The damage award was for loss incurred for the years 1949 through 1956. The master found that but for the Switzers' unlawful activity, Radiant would have had gross sales of $68,000 in 1949. Lost sales were estimated to be $40,900. Radiant's actual 1950 gross sales, using 1949 equipment, were $85,200. Total "but for" 1949 gross sales were only 29% of Switzer's actual 1949 sales. And in 1951, while still using 1949 equipment, Radiant's actual gross was 52% of Switzer's net sales.

For 1950 the master found total Radiant gross "but for" sales of $351,000, lost sales being $258,400. Radiant's

actual 1952 gross, using 1949 equipment, was $404,400. Moreover, Radiant's 1950 "but for" sales were 72% of Switzer's actual 1950 sales, even though two years later Radiant's actual gross sales were a full 88% of Switzer's actual net sales for the same year.

Radiant was determined to have lost sales of $173,600 in 1951, total "but for" sales being $525,000. The record shows that Radiant's actual production was 95% of the master's estimate. Total "but for" sales were approximately 90% of Switzer's net for 1951. Radiant's actual 1951 sales were up over 350% from 1950. Comparison of the 1950 and 1951 "but for" sales shows an upturn of only 50%.

For 1952 the master concluded that Radiant lost sales of $295,600. Total sales (estimated lost sales plus actual sales) were $700,000. Radiant's actual gross sales for 1952 were up 32% from the previous year. The master's determination represented as 33% increase on an estimated basis. Yet Radiant made a rapid surge in 1952, second quarter actual gross sales being 138.1% of Switzer's actual net. This was up 71% from the first quarter. Radiant's sales plummeted at this point, due in part to Switzer's initiation of the patent suit. The $700,000 figure is 152% of Switzer's 1952 actual net sales. In view of the rapidity with which Radiant was overtaking Switzer, $700,000 is a reasonable extrapolation from the available data.

Radiant's 1953 lost sales were estimated to be $330,900, total "but for" sales being $660,000. The "but for" figure is 142% of Switzer's actual net for the same period, a 10% decline from the 1952 ratio.

For 1954, by which time Switzer abandoned its wrongful activity, the master gave Radiant total "but for" sales of $678,000. Lost sales were $339,300. The ef-

fects of Switzer's unlawful activity were not dissipated immediately upon its cessation, but were residual. The master's 1954 estimate shows as 3% growth from 1953. Radiant's actual growth was 3%.

For the second year after Switzer halted its anti-trust actions, 1955, the master gave Radiant lost sales of $343,500. Total "but for" sales were $757,200. Radiant's actual average quarterly net sales for 1955 were still below Radiant's net sales for the second quarter of 1952. The effects of Switzer's prior unlawful acts were still making themselves known. The master's 1955 figure is conservative.

The 1956 figures are lost sales of $184,000 and total "but for" sales of $730,300. The master concluded that Radiant's sales would have dropped in 1956, as his figures show. Yet Radiant's actual sales, both gross and net, rose.

The use of this comparative data was permissible. *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251 (1946). A scrutiny of the total picture as revealed by the record shows that not only was the master's determination within the range of same judgment, it was quite conservative.

E. *Rate of Profit*

We now turn to the second element of the lost net profits figure, the rate of net profit determination. The master concluded that during the damage period, Radiant would have had a net profit of 16% on its lost sales. Switzer suggests that the figure, on its face, is excessive. Though at first blush 16% appears to be a high rate of return, it need only be noted that the industry, during the damage period, was a burgeoning one with a concomitant high risk of failure thus justifying what might otherwise be an abnormal net profit.

Switzer also assails the figure on an arithmetical ground. It is argued that the master arrived at the 16% figure by rounding off 16.6% which, in turn, was mean between 19.05% (Radiant's highest estimate) and 14.15% (Radiant's actual net profit during the damage period as supposed by the master). The master, it is urged, miscalculated the last figure, Radiant's actual net profit during the damage period being only 11.93%. Thus the mean between Radiant's correct actual rate of net profit and highest estimate of net profit rate (11.93% and 19.05%) is 15.49% which should be rounded off to 15%. This one per cent difference is claimed to have added $59,000 to the judgment.

The fallacy in the argument is the assumption that the master calculated the net profit ratio solely on an arithmetical basis. He did no such thing. Although he did calculate the mean between the highest estimate of Radiant's net profit ratio and what was thought to have been Radiant's actual net profit ratio during the damage years, the record shows that the mean was not meant to be the final figure. Obviously 16.6% when rounded off does not equal 16%. Moreover, the master made certain very imprecise, yet nevertheless proper, downward adjustments. One such adjustment was made to take Switzer's net sales point into consideration.

The resulting net profit figure is, then, a composite one, combining arithmetical calculations and value judgments attributable to imprecise factors. We cannot determine how much weight the master gave to the various components in arriving at his conclusion. Since the result is not clearly erroneous, we cannot make an adjustment to the final figure simply because of error in one of the components when we cannot know how much weight, if

any, was given to the erroneous element. It is improper to isolate individual factors entering into a decision and treat them as controlling considerations. *Cf. United States of America v. I.C.C.*, 396 U.S. 491 (1970). We find no error.

The judgment appealed from should be affirmed.

JUDGMENT OF WHICH REVIEW IS SOUGHT.

(Entered June 26, 1970.)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.
Nos. 17730, 17731.

HARRY P. LOCKLIN AND ELMER J. BRANDT,
d/b/a RADIANT COLOR COMPANY,
Counter-Plaintiffs-Appellees and Cross-Appellants,

VS.

DAY-GLO COLOR CORPORATION
(FORMERLY SWITZER BROS., INC.),
ROBERT C. SWITZER AND JOSEPH L. SWITZER,
Counter Defendants-Appellants and Cross-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

---

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with interest, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of the costs of these appeals between the parties.

ORDER DENYING REHEARING.

(Entered September 15, 1970.)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 17730

HARRY P. LOCKLIN AND ELMER J. BRANT, etc.,
Counter-Plaintiffs-Appellees,

VS.

DAY-GLO COLOR CORP., *etc., et al.,*
Counter-Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of appellants for a rehearing en banc in the above entitled appeal, and no member of the panel and no Judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and all members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of appellants for a rehearing in the above entitled appeal be, and the same is hereby, DENIED.

OPINION OF THE DISTRICT COURT.

Entered by Judge Decker and Affirmed in the Judgment of which Review Is Sought.

CCH 1969 Trade Cases ¶ 72,705

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

No. 52 C 1198.

HARRY P. LOCKLIN, *et al.*,
Counter-Plaintiffs,

vs.

DAY-GLO COLOR CORP., *formerly known as* SWITZER BROTHERS, INC., *et al.*,
Counter-Defendants.

In 1961 the Seventh Circuit upheld the district court's finding that Switzer Brothers, Inc., injured Radiant Color Company by its violations of the antitrust laws. *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39 (7th Cir. 1961). The case was then referred to Barnabas F. Sears as special master for an accounting of the damages suffered. Both parties now object to the master's findings.

The master awarded Radiant $1,145,378.73 as follows: (1) $314,656.00 for lost profits from 1949 to 1956, caused by Switzer's forestalling of Radiant's normal business growth, (2) $42,136.91 for expenses, including attorney's fees, incurred in combating Switzer's illegal coercion and in defending two lawsuits, and (3) $75,000.00 as a reasonable attorney's fee for the prosecution of this lawsuit up to the beginning of the accounting. The former two items are trebled in accordance with 15 U. S. C. § 15.

While Radiant claims this award does not compensate for its loss, Switzer maintains that Radiant has failed to prove any damages. Both parties assert numerous errors. The evidence adequately supports the findings, however, and there are no errors of law. I therefore affirm the report and adopt its findings and conclusions.

The objections fall into two main categories: factual conclusions from the evidence, and legal principles guiding the master.

I. The Evidence.

This court's review of the findings of fact is governed by the "clearly erroneous" standard of F. R. C. P. 53(e)(2). See generally *In re Vernon Hills, Inc.*, 348 F.2d 4 (7th Cir. 1965); *United States v. 124.84 Acres of Land*, 387 F.2d 912 (7th Cir. 1968).

Although Switzer protests the master's reliance upon two of Radiant's experts, the master personally observed the witnesses during the forty-eight days of hearings. It is his province to judge their credibility and to determine what weight should be assigned to each witness' testimony. See, *e.g.*, *Fluor Corp. v. Illinois Power Co.*, 326 F.2d 374, 382 (7th Cir. 1964).

Additionally, the parties' objections to the following determinations are essentially factual arguments: (1) Radiant's lost sales in each disputed year, (2) the profit rate used by the master, (3) Radiant's expenses for counteracting the Switzer coercion, (4) the cost of defending Radiant's customers, Chicago Cardboard Company and James P. Bryne, and (5) the reasonableness of the attorney's fee for prosecuting this action.[1] To illustrate, Switzer objects

[1] The master appropriately considered the character of the services rendered, the time involved, the reasonableness of the time charges, and the result obtained.

to the experts' use of gross sales rather than net sales in calculating lost sales. At the hearing, however, Switzer offered no evidence that this method of computation was erroneous. Furthermore, on cross-examination, Radiant's experts testified that the use of gross sales would make little, if any, significant difference in the computation of lost profits.[2]

In his exhaustive and careful report, the master thoroughly considered the witnesses' testimony and the documentary exhibits. His findings are clearly supported by the evidence.

II. Legal Questions.

Throughout their briefs and arguments, the parties attempt to convert factual determinations into issues of law. Only four legal questions are presented which call for comment.

First, Switzer claims the master disregarded the standard of damages for antitrust cases. But its suggested guideline would require Radiant to prove specifically each sale which was lost. As stated in *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 713 (9th Cir. 1959):

> "There is no particular way for a plaintiff, injured by a defendant's violation of the anti-trust laws to show precisely what sales it lost. It certainly cannot prove precisely how many cases of 'Wax Seal' were *not sold*."

The master appropriately followed the standard established in *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563 (1931):

---

[2] Similarly, while $7,777.41 is a very small figure for Radiant's expenses in combating the Switzer program, the master was justified in disallowing additional expenses because the evidence was inadequate.

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, while he alone is responsible for making, were otherwise."

See also *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 263 (1946); *Cape Cod Food Products v. National Cranberry Assn.*, 199 F. Supp. 900, 910-911 (D. Mass. 1954).

Second, Switzer maintains that Radiant's dismissal of a related lawsuit in California released Switzer from all liability. At the time of this dismissal, however, the district court's decree against Switzer had already been entered. By analogy to the common law rule,[3] Switzer proposes that a release[4] of one joint tortfeasor should destroy a judgment the injured party has already obtained against other tortfeasors, regardless of the parties'

---

[3] The common law rule did not extend to the situation where the aggrieved party had a judgment against one of the tortfeasors. Compare Prosser, Torts § 46 (3rd ed. 1964) (a release only affected "causes of action"). Moreover, after judgment, a common law plaintiff could obtain piecemeal collections against different defendants. See, *e.g.*, *Burke v. W. R. Chamberlain & Co.*, 125 P.2d 120, 125-6 (Calif., Dist. Ct. of Appeals, 1942).

[4] In this case, there is a serious factual question whether Radiant's dismissal of the California suit constituted a release. There was no written document. Although Radiant subsequently obtained a substantial sale from the California defendant, this contract was not consummated until several months after the dismissal.

intention. Such a rule would only promote injustice. Moreover, the Illinois, California and Minnesota courts have rejected Switzer's contention. *Van Meter v. Gurney*, 251 Ill. App. 184, 187 (1st Dist. 1929);[5] *Gronquist v. Olson*, 64 N.W. 2d 159, 164-6 (Minn. 1954); *Shea v. City of San Bernardino*, 62 P.2d 365, 367-8 (Calif. 1936); *White v. Cox Bros. Const. Co.*, 329 P.2d 14, 19 (Calif., Dist. Ct. of Appeals, 1958).[6]

Third, Radiant seeks an increase in the damage award to reflect the greater purchasing power of the dollar in the years injury was sustained. Such an adjustment, however, is not proper. See *Bates v. United States*, 108 F.2d 407 (7th Cir. 1939). *Compare Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926).

Finally, Switzer objects to the master's consideration of damages for the years 1949-52, claiming that prior decisions in this case prohibit such an award. In its original decision, the district court enumerated five specific headings of damages, stating that Radiant had been injured in those respects "and possibly in others" (findings 29-34).[7] The trial court refused to adopt a finding tendered by Radiant which specifically mentioned the forestalling of its

---

[5] "It is argued that, because the judgment arises out of an action in tort, the rule as to a release of one joint tort-feasor must prevail. It does not follow. The claim in tort is merged into the judgment which is a debt. . . ."

[6] See also *Harllee v. City of Gulfport*, 120 F.2d 41, 42 (5th Cir. 1941). *Compare In re United Cigar Stores Co. of America*, 85 F.2d 11, 12 (2nd Cir. 1936); *Judson v. Peoples Bank & Trust Co. of Westfield*, 110 A.2d 24, 33 (N.J. 1954).

[7] Findings 33 and 34 stated that "Commencing shortly after June 5, 1952 . . ." and "Commencing shortly after February 9, 1953 . . ." Radiant was damaged in certain ways. Switzer argues that these introductory clauses were intended to be definitive holdings that no damage occurred prior to these dates. The district court, however, only determined if an antitrust violation had occurred and whether Radiant had been injured thereby. It did not attempt to specify the damage. Switzer's interpretation of these findings therefore seems strained.

business growth from 1949. Radiant therefore requested the Court of Appeals to amplify findings 29 to include such injury. The seventh Circuit, however, explained that:

> "The conclusions of law and the decree do not purport to limit the scope of inquiry upon the trial as to the amount of damages. The cause is referred to the master to ascertain and report an account of 'the damages suffered.' Since appellee [Radiant] is not restricted in the scope of its proof before the master, it has no cause to complain that finding 29 might have been more specifically cast."

Switzer Brothers, Inc. v. Locklin, 297 F.2d 29, 49 (7th Cir. 1961).

III. Conclusion.

I have carefully considered the other objections raised by the parties and find that none of them merits discussion.

The master has painstakingly reviewed the voluminous evidence. His findings of fact are adequately supported by the evidence and must therefore be affirmed. Moreover, the proper legal principles were applied to the case; each of the four contested issues was correctly resolved by the master.

Radiant will prepare and submit a proper judgment order within ten days and the same will be entered.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: February 4, 1969.

DISTRICT COURT JUDGMENT AFFIRMED BY THE JUDGMENT OF WHICH REVIEW IS SOUGHT.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION.

No. 52 C 1198

HARRY P. LOCKLIN, *et al.*,
Counter-Plaintiffs,

VS.

DAY-GLO COLOR CORP., formerly known as SWITZER BROTHERS, INC., *et al.*,
Counter-Defendants.

This matter having come on for hearing under Rule 53(e)(2) of the Federal Rules of Civil Procedure upon written objections filed by both parties to the report filed June 3, 1968, by Barnabas F. Sears, Special Master, and the court having considered the report of the Special Master, the briefs and oral arguments submitted by the respective parties, and being fully advised,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Court has jurisdiction over the parties to this litigation and over the subject matter thereof.

2. For the reasons set forth in the Memorandum Opinion filed herein on February 4, 1969, the court accepts and adopts the report of the Special Master in full, overrules all objections filed thereto by either of the parties and accepts and confirms all findings of fact and conclusions of law set forth in said report as the findings of fact and conclusions of law of the court.

3. That counter-plaintiffs, Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, have and recover from counter-defendants, Day-Glo Color Corp., formerly known as Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, the sum of $1,070,378.73 as treble damages arising from their violation of the anti-trust laws, together with interest at the legal rate of 6% on such sum commencing on this date until such judgment is satisfied.

4. That counter-plaintiffs, Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, have and recover from the counter-defendants, Day-Glo Color Corp., formerly known as Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, the sum of $75,000.00 as reasonable attorneys' fees for prosecution of this action up to and including the commencement of the accounting and for prosecuting the counterclaim through the Court of Appeals decision, together with interest at the legal rate of 6% on such sum commencing on this date until such judgment is satisfied.

5. The counter-plaintiffs, Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, shall recover from the counter-defendants, Day-Glo Color Corp., formerly known as Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, their costs of this action, the same to be taxed by the clerk pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

6. The counter-plaintiffs, Harry P. Locklin and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company, are entitled to a further allowance of attorneys' fees for services rendered by their attorneys before the special master on the accounting, as

well as services rendered in this court in securing the approval of the Master's Report; such allowance to be made by the court after this judgment shall become final.

7. This judgment shall be considered as a final judgment in all respects except for a later determination to be made by the court as to the amount of attorneys' fees to be awarded under the provisions of paragraph 6; and it is hereby certified, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason to delay the taking of an appeal.

ENTER:

BERNARD M. DECKER,
United States District Judge.

Dated: March 13, 1969.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ORIGINAL TRIAL ADJUDICATING ANTI-TRUST VIOLATION.

Entered by Judge Miner and Affirmed by the Court of Appeals, 297 F.2d 39.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

Civil Action No. 52-C-1198.

HARRY P. LOCKLIN,
ELMER J. BRANT,
General Partners doing business under the firm name of
RADIANT COLOR COMPANY,
Counter-Plaintiffs,

VS.

SWITZER BROTHERS, INC.,
ROBERT C. SWITZER,
JOSEPH L. SWITZER,
Counter-Defendants.

Before
HON. JULIUS H. MINER, *United States District Judge.*

This matter having come on for trial, and the Court having heard the evidence and having examined and considered the documentary and other exhibits introduced into evidence at the said trial, and the Court having read and fully considered the briefs and arguments respectively submitted by the parties and being fully advised, the Court renders its Findings of Fact and Conclusions of Law as follows:

Findings of Facts.

1. Harry P. Locklin and Elmer J. Brant are co-partners doing business under the firm name and style of Radiant Color Company. They are referred to in these Findings sometimes as Radiant.

2. Switzer Brothers, Inc. is an Ohio corporation, wholly owned by Robert C. Switzer and Joseph L. Switzer. All three defendants are referred to in these Findings sometimes collectively as Switzers.

3. At all times from January 1, 1949 until the present, Radiant and the Switzers have been competitors in the business of manufacturing and selling daylight fluorescent materials. The products of Radiant are called "Velva-Glo" and those of Switzers are called "Day-Glo."

4. Daylight fluorescence materials are commonly understood by those in the trade to include liquid colors, coated paper and cardboard, and pigments which produce brilliant color effects by virtue of the phenomenon of fluorescence in response to the visible light of daylight.

5. The daylight fluorescent materials produced by Radiant and Switzers have been and are being sold in interstate commerce through channels of trade including sign makers, printers and the like, who use such daylight fluorescent materials to produce completed advertising, signalling, amusement and other novelty devices ornamented or fabricated from such daylight fluorescent materials. Typical examples include billboards, posters, car cards, window banners, window displays, Christmas cards, cut out letters, magazine inserts, and the like. These are called "end-use" devices in these Findings.

6. On January 1, 1949, the date when Radiant began business as a partnership, Switzer Brothers, Inc. was the exclusive licensee of a number of patents and patent appli-

cations owned by Robert C. Switzer, Joseph L. Switzer, and their wives, and relating to fluorescent materials and fluorescent end-use devices. These are hereafter referred to as the Switzer patents and applications.

7. Switzer Brothers, Inc. entered into contracts with a number of manufacturers of daylight fluorescent materials licensing them to use the trade-mark "Day-Glo" and the Switzer patents and applications. The manufacturers in turn agreed

> (a) that they would sell the daylight fluorescent materials only to licensed dealers and only to licensed end-users, and
>
> (b) that they would produce only Day-Glo products under the license arrangement.

The licensees under such agreements included Sherwin-Williams Company, Lawter Chemicals, Inc., Dennison Manufacturing Company, Mid-States Gummed Paper Company, International Printing Ink Company and National Card, Mat and Board Company.

8. Under the foregoing arrangement, Switzer Brothers, Inc. and the licensed manufacturers of daylight fluorescent materials entered into contracts with dealers in daylight fluorescent materials under which they licensed the dealers to sell "Day-Glo" products. Under these agreements, the dealers agreed

> (a) that they would deal only in those daylight fluorescent products which carry the trade-mark "Day-Glo" and have been obtained from Switzer Brothers, Inc. or other sources authorized in writing by Switzer Brothers, Inc. to produce Day-Glo materials;
>
> (b) that they would supply Day-Glo materials only to Day-Glo licensees; and

(c) that they would not compete with Day-Glo licensees, with Switzer Brothers, Inc., or with other authorized sources of Day-Glo materials.

9. Under the foregoing arrangements, Switzer Brothers, Inc., as principal, and the licensed manufacturers of, and dealers in, daylight fluorescent materials, as agents, entered into written agreements with manufacturers of end-use devices licensing them under the trademark "Day-Glo" and under the Switzer patents and applications. The manufacturers of the end-use devices in turn agreed

(a) that they would use the trade-mark "Day-Glo" on all daylight fluorescent devices manufactured by them, and

(b) that they would obtain their daylight fluorescent materials only from sources "approved in writing" by Switzer Brothers, Inc. to furnish or supply such materials.

10. In addition to the formal end-use licensees referred to in Finding 9, Switzer Brothers, Inc. and its manufacturing licensees named in Finding 7 have sold certain of the daylight fluorescent materials manufactured by them under a label license giving the purchasers of such materials a free royalty-paid license to use such materials only in the manufacture of a device covered by pertinent Switzer patents and applications. At the beginning, such licenses were issued for non-production uses only. On October 27, 1952, this form of label licensing was extended to fluorescent coated paper, and on October 15, 1953, it was extended to all daylight fluorescent materials.

11. Except as provided in Finding 10, no licenses were granted to any manufacturer of end-use devices other than those patent licenses which are automatically included in the formal end-use licenses referred to in Finding 9.

12. All of such licenses referred to in Findings 7, 9 and 10 included a license under Robert C. Switzer named patent 2,417,384 issued March 11, 1947, for *Daylight Fluorescent Signaling and Display Device*. The Switzers have characterized this patent as the basic patent in daylight fluorescent devices. By its terms it purports to cover "A device for conveying intelligence visually in daylight beyond the range of subtractive color perceptibility" describing its specific ingredients or elements, but it does not purport to cover the daylight fluorescent materials used in making such a device.

13. All of such licenses referred to in Findings 7, 9 and 10 made after July 5, 1949, included a license under Joseph L. Switzer and Robert C. Switzer patent 2,475,529 issued July 5, 1949 for *Fluorescent Device and Method of Making the Same*. The Switzers have characterized this patent as including all daylight fluorescent devices made with poster papers, cotton fabrics, fluorescent coated papers and like supports. By its terms it covers "a fluorescent device for use at a distance from a source of fluoresciginous radiations" describing its specific ingredients and elements, as well as the method of making such a device. None of the claims purports to cover fluorescent materials used in making such a device.

14. The fluorescent materials manufactured by Switzer Brothers, Inc. and its manufacturing licenses named in Finding 7 have substantial non-infringing uses not defined in any of the claims of patents 2,417,384 and 2,475,529.

15. In furtherance of the licensing program, the Switzers, starting early in 1949, charged non-licensees under the "Day-Glo" program and all users of non-licensed displays with infringement of Letters Patent 2,417,384 and 2,475,529 by advertisements and news releases in the trade papers, by letters and by oral communications.

16. In furtherance of the Day-Glo licensing program, Switzer, starting in mid-1949, threatened all non-licensees under the "Day-Glo" program and all users of non-licensed displays with patent infringement suits under Letters Patent 2,417,384 and 2,475,529 by advertisements in the trade papers, by letters and by oral communications.

17. In furtherance of the Day-Glo license program, Switzers commenced patent litigation suits in scattered sections of the country against unlicensed dealers in daylight fluorescent materials, unlicensed manufacturers of end-use devices and users of unlicensed end-use devices.

18. In furtherance of the Day-Glo licensing program, Switzers instituted actions for alleged patent infringements against customers of Radiant Color Company, one such action being the instant action in which complaint was filed on June 5, 1952, and another action being an action filed in the United States District Court for the Northern District of Ohio, Eastern Division, on September 19, 1953, as Civil Action No. 29,975, in which the parties plaintiff were Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, and the defendant was James P. Byrne, doing business as Byrne Wallpaper and Paint Stores. Switzer Brothers, Inc., among other things, intended thereby to deter customers and prospective customers of Radiant Color Company from purchasing fluorescent materials produced by Radiant Color Company.

19. The publications and threats were, at least in part, unwarranted in fact because the Switzer patents did not purport to cover the broad field of daylight fluorescent displays for which claim was made in the publications.

20. Switzers made the publications and threats, and commenced the litigations, without malice or bad faith, with the belief and understanding that their said patents

were valid and their publications and threats warranted by the scope of their patent claims, their trademark registrations for "Day-Glo," and the patent and trade-mark laws of the United States.

21. Notwithstanding the matters in Finding 20,

(a) the publications were excessive;

(b) Switzers should have known that the publications were excessive; and

(c) the publications were not followed promptly by litigation against all those to whom they were directed.

22. The parties have submitted substantial probative evidence concerning the prior state of the art with which we are here concerned. Although such evidence appears sufficient to permit findings concerning anticipation of the instant patent claims by the prior art, the parties have agreed in open court that the issues of patent validity and infringement are not before this Court. Such agreement may well have been motivated by *Switzer Brothers, Inc. v. Chicago Cardboard Co.*, 252 F.2d 407 (C.A. 7, 1958), which held that the infringement issue was not properly before the Court in this case, and *Texas-Miller Hat Corp. v. Switzer Bros.*, 201 F.2d 824 (C.A. 5, 1953), certiorari denied 346 U. S. 821, which held that two patents, including the Switzer "basic patent" number 2,417,384, were invalid. Although the briefs include arguments directed to the issues of patent validity and infringement, the Court adheres to the said stipulation and, therefore, makes no findings concerning patent validity or infringement.

23. The Switzer agreements referred to in Findings 7, 8, 9 and 10 have had, and are still having, the effect of substantially lessening competition and have tended, and are still tending, to create a monopoly in daylight fluorescent materials.

24. The Switzer program resulted in a combination which included Switzer Brothers, Inc., as well as at least eight other manufacturers of daylight fluorescent materials; dealers in daylight fluorescent materials in all parts of the United States; and more than 4,000 licensed manufacturers of "Day-Glo" end-use devices; all of whom were forbidden to deal in unauthorized daylight fluorescent materials.

25. While this program was in effect, Switzer Brothers, Inc., alone, built up a market of over $500,000 per annum in the sale of daylight fluorescent materials.

26. Radiant Color Company was within the target area of the Switzer licensing, publicity and litigation program. Licensees were advised that Velva-Glo materials were unapproved; licensees and others were advised that Velva-Glo materials were infringements; customers of Radiant were threatened with suit; and finally customers of Radiant were actually sued by the Switzers.

27. Robert C. Switzer and Joseph L. Switzer each participated in the acts of which Radiant has complained in that:

(a) Robert C. Switzer and Joseph L. Switzer, at least as late as December 16, 1955, were the owners of an undivided ¾th interest, as tenants in common, of patents 2,417,384 and 2,475,529 and of the applications upon which said patents were issued and their wives, Patricia Switzer and Elise deGroot Switzer, were the owners of the remaining undivided ¼th interest of said patents;

(b) Robert C. Switzer and Joseph L. Switzer, together with their wives, Patricia Switzer and Elise deGroot Switzer, licensed Switzer Brothers, Inc., under patents 2,417,384 and 2,475,529 and authorized Switzer Brothers, Inc. and third persons to execute the licenses referred to in Findings 7, 8, 9 and 10.

(c) Robert C. Switzer and Joseph L. Switzer were the sole stockholders of Switzer Brothers, Inc. and were officers and directors of Switzer Brothers, Inc. at all times since prior to January 1, 1949;

(d) Robert C. Switzer and Joseph L. Switzer authorized, directed and/or did some of the acts contributing in whole or in part to the matters found above;

(e) Robert C. Switzer and Joseph L. Switzer authorized Switzer Brothers, Inc., to commence the patent infringement actions referred to above and agreed, together with their wives, to pay Switzer Brothers, Inc. the reasonable expenses incurred by it in prosecuting said litigation;

(f) Robert C. Switzer and Joseph L. Switzer availed themselves of the fruits of the aforesaid conduct of Switzer Brothers, Inc. in that Robert C. Switzer and Joseph L. Switzer received royalty payments from Switzer Brothers, Inc. both under its license and under sublicenses granted by Switzer Brothers, Inc. as found in Findings 7 and 9 above, and in that they both received dividends from Switzer Brothers, Inc. accruing in part from profits made by Switzer Brothers, Inc. and arising from the acts as found herein.

28. The foregoing conduct of Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer has damaged the public in general:

(a) by depriving individual members of the public of their right to purchase unpatented fluorescent materials in a free, competitive, unrestricted market; and

(b) by coercing individual members of the public to purchase "Day-Glo" fluorescent materials instead of the fluorescent materials produced by others.

29. Radiant Color Company has been directly damaged by the Switzer license program in the respects noted in Findings 30 to 34 below, and possibly in others.

30. Commencing in 1950 and continuing until late in 1953, Radiant was put to expense in counteracting the Switzer propaganda and in reassuring dealers and customers that the Switzer program could not prevent the use of Radiant's products.

31. Commencing on June 5, 1952 and continuing until February 11, 1958, Radiant was put to the expense of defending its customer, Chicago Cardboard Company, by virtue of the complaint filed in this action.

32. Commencing on February 9, 1953 and continuing until April 8, 1957, Radiant was put to the expense of defending its customer, James P. Byrne, in the Northern District of Ohio, Eastern Division.

33. Commencing shortly after June 5, 1952, Radiant's market in Velva-Glo paper became depressed due, at least in part, to the commencement of the instant action, and Radiant has lost profits which it would otherwise have made.

34. Commencing shortly after February 9, 1953, Radiant's market in Velva-Glo silk screen colors became depressed due, at least in part, to the commencement of the Cleveland suit, and Radiant has lost profits which it would otherwise have made.

35. The record does not disclose the dollar value of the damages enumerated in Findings 28 to 32 above, thereby making an accounting the only appropriate procedure for ascertaining the dollar extent of such damages.

36. Switzers have introduced no evidence in support of paragraphs 19, 20, 21 and 22 of their counteraction against Radiant.

37. Unless injunctive relief is granted in this action, Radiant Color Company will sustain further and additional damages by virtue of the aforesaid continuing violation of the antitrust laws.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties to this litigation and over the subject matter thereof.

2. Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, have misused Switzer patents 2,417,-384 and 2,475,529, as well as the Day-Glo trademarks, in restraint of trade between the states and in a way tending to create a monopoly in unpatented daylight fluorescent materials in part

> (a) by granting the exclusive right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc., and in part
>
> (b) by granting a preferential right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc.,

and have thereby violated the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

3. Radiant Color Company is entitled to a writ of injunction to be issued out of and under the seal of this Court perpetually restraining and enjoining said Switzer Brothers, Inc., Robert C. Switzer, Joseph L. Switzer, the

officers of Switzer Brothers, Inc., their agents, employeess. attorneys, and all persons acting on behalf of any of them

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such license used is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers, Inc., or from sources designated by it, any daylight fluorescent materials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on conditions that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from a source designated by it;

(c) from in any way discriminating, in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source designated by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other source;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents in violation of the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents.

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claims of said patents.

4. Radiant Color Company is entitled to have this cause referred to a special master to ascertain, take, state, and report on account of the damages suffered, and costs expended by Radiant Color Company and the amount of reasonable attorneys' fees.

5. Radiant Color Company is entitled to a judgment dismissing the Counter-claim against Intervenors filed by Switzer Brothers, Inc., Robert C. Switzer, and Joseph L. Switzer.

6. The amount allowable to Radiant Color Company by reason of its damages sustained and costs expended, and the matter of costs on accounting, shall await the further order of this Court.

JUDGMENT IN THE ORIGINAL TRIAL ADJUDICATING ANTITRUST VIOLATION.

Entered by Judge Miner and affirmed by the Court of Appeals, 297 F.2d 39.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

Civil Action No. 52-C-1198.

HARRY P. LOCKLIN,
ELMER J. BRANT,
General Partners doing business under the firm name of
RADIANT COLOR COMPANY,
Counter-Plaintiffs,

v.

SWITZER BROTHERS, INC.,
ROBERT C. SWITZER,
JOSEPH L. SWITZER,
Counter-Defendants.

HON. JULIUS H. MINER, *United States District Judge.*

This matter having come on for trial, and the Court having heard the evidence and having examined and considered the documentary and other exhibits introduced into evidence at the said trial, and the Court having read and fully considered the briefs and arguments respectively submitted by the parties and being fully advised, and the Court having entered its Findings of Fact and Conclusions of Law;

IT IS ORDERED, ADJUDGED AND DECREED, as follows:

1. The Court has jurisdiction over the parties to this litigation and over the subject matter thereof.

2. Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, have misused Switzer patents 2,417,-384 and 2,475,529, as well as the Day-Glo trademarks, in restraint of trade between the states and in a way tending to create a monopoly in unpatented daylight fluorescent materials in part

(a) by granting the exclusive right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc., and in part

(b) by granting a preferential right to use the combination claimed by said patents to users of said combination who obtained the daylight fluorescent materials therefor from Switzer Brothers, Inc., or from sources designated by Switzer Brothers, Inc.,

and have thereby violated the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14.

3. A writ of injunction shall issue out of and under the Seal of this Court perpetually restraining and enjoining said Switzer Brothers, Inc., Robert C. Switzer, Joseph L. Switzer, the officers of Switzer Brothers, Inc., their agents, employees, attorneys, and all persons acting on behalf of any of them,

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such licensed use is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers, Inc., or from sources designated by it, any daylight fluorescent ma-

terials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on condition that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from a source designated by it;

(c) from in any way discriminating in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source designated by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other source;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents in violation of the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14;

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents;

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claims of said patents.

4. This cause shall be referred to a special master to ascertain, take, state, and report an account of the damages

suffered, and costs expended, by Radiant Color Company and the amount of reasonable attorneys' fees; and

(a) Radiant Color Company on such accounting shall have the right to cause the examination of the officers, servants, and employees of Switzer Brothers, Inc., Robert C. Switzer, and Joseph L. Switzer, orally or otherwise, and to examine other witnesses, and to cause the production and examination of the pertinent books, vouchers, records and documents of said Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, and to have all necessary process of the Court to compel such attendance and production before the said master at such times and places as he shall direct; and

(b) Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, on such accounting shall have the right to cause the examination of the officers, servants, and employees of Radiant Color Company, orally or otherwise, and to examine other witnesses, and to cause the production and examination of the pertinent books, vouchers, records and documents of said Radiant Color Company, and to have all necessary process of the Court to compel such attendance and production before the said master, at such times and places as he shall direct.

5. The Counter-claim against Intervenors filed by Switzer Brothers, Inc., Robert C. Switzer and Joseph L. Switzer, is hereby dismissed.

6. The amount allowable to Radiant Color Company by reason of its damages sustained and costs expended, and the matter of costs on accounting shall await the further order of this Court.

7. The parties shall appear before this Court on September 19, 1960, at which time the Court will hear any motions the parties may desire to submit, and the matter of the person of the special master shall be determined.

OPINION OF THE COURT OF APPEALS AFFIRMING JUDGE MINER'S DECISION ADJUDICATING ANTITRUST VIOLATION, 297 F.2d 39.

(November 30, 1961.)

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

SWITZER BROTHERS, INC., Robert C. Switzer and Joseph L. Switzer,
Counter-Defendants, Appellants, and Cross-Appellees,

v.

HARRY P. LOCKLIN and Elmer J. Brant, general partners doing business under the firm name of Radiant Color Company,
Counter-Plaintiffs, Appellees, and Cross-Appellants.

MERCER, District Judge.

Appellants, Switzer Bros., Inc., Robert C. Switzer and Joseph L. Switzer, appeal from a judgment granting injunctive relief to appellee and ordering appellants to render an accounting on account of violation of 15 U.S.C.A. §§ 1, 2 and 14. Harry P. Locklin and Elmer J. Brant, d/b/a Radiant Color Company, prosecute a cross-appeal, contending that the court below erred in failing to enjoin appellants from continuing to use the registered trademark, "Day-Glo," in the marketing of daylight fluorescent materials.

Hereinafter, for convenience, the name Switzer, is used to denote Switzer Brothers, Inc., the term appellants is used to denote Switzer, Robert C. Switzer and Joseph L. Switzer, collectively, and the term appellee is used to denote Radiant Color Company.

Switzer, an Ohio corporation which is wholly owned by the individual appellants, Robert C. and Joseph L. Switzer, is engaged in the manufacturing and selling of daylight fluorescent materials, which it markets in interstate commerce under the registered trademark "Day-Glo." At all times since January 1, 1949, appellee has been a competitor of Switzer, manufacturing and marketing daylight fluorescent materials in interstate commerce under the trade name, "Velva-Glo."

The cause was tried upon appellee's counter-claim for injunctive relief and treble damages in which it was alleged that appellants had attempted to monopolize the fluorescent materials market in violation of the antitrust laws, and appellants' counterclaim against appellee, alleging antitrust violations and unfair competition.[1]

After a trial which lasted for some three weeks, the District Court entered voluminous findings of fact, about some of which the principal issues for decision revolve. The findings are summarized, generally, to the extent deemed necessary to an understanding of the issues, before specific contentions against the findings are treated in relationship to the applicable law.

Daylight fluorescent materials are pigments, liquid colors and coated paper and cardboard which produce brilliant color effects through the phenomenon of fluorescence in response to the visible light of day. End-use

---

[1] The action was originally commenced by appellants as a patent infringement suit against a number of appellee's customers who are engaged in making and marketing daylight fluorescent advertising displays. Appellee intervened on behalf of its customers and filed answers to the complaint. Pursuant to the mandate of this court, Switzer Bros. v. Locklin, 7 Cir., 207 F.2d 488, appellee filed its counter-claim under the antitrust laws. The patent infringement complaint was subsequently dismissed, and that judgment was affirmed. Switzer Bros. v. Chicago Cardboard Co., 7 Cir., 252 F.2d 497. The cause was then tried upon the issues raised under the antitrust laws.

products in which such materials are employed include signalling, novelty and advertising devices.

Switzer is the assignee of various patents relating, insofar as here pertinent, to the production of daylight fluorescent devices and displays. Switzer is also the owner of the registered trademark "Day-Glo" which it employs in marketing its fluorescent materials. At all times material to this cause, Switzer marketed its products only through a pyramid of licenced manufacturers and dealers employing such materials. Switzer is, as the court found, the apex of the pyramid, superimposed above at least eight licensed manufacturers of daylight fluorescent materials, licensed dealers in all parts of the United States and more than 4,000 end-use manufacturers who composed the base of the pyramid.

Under contracts with Sherwin-Williams Company and other manufacturers of pigments, papers and inks, Switzer licensed each manufacturer to use the Switzer patents upon consideration of the manufacturers' agreements that they would market all fluorescent materials manufactured by them under the Day-Glo mark and would sell such materials only to Switzer licensed dealers and end-use device manufacturers. The manufacturers were authorized, with Switzer's approval, to enter into licensing agreements with dealers and end-users.

Switzer, and its licensed manufacturers, entered into contracts with a number of dealers, under which such dealers were licensed to sell Day-Glo materials, upon the dealer's agreement that they would deal only in daylight fluorescent materials which carried the Day-Glo mark and were obtained from Switzer or other sources authorized in writing by Switzer to produce fluorescent materials; that they would sell such material only to Switzer licensees; and that they would not compete with Switzer or

with other authorized sources of Day-Glo materials. These dealers, also with Switzer's approval, were authorized to enter into agreements with end-use manufacturers, licensing such manufacturers to use the Switzer patents.

Finally, agreements were made with the more than 4,000 end-use manufacturers under which they were granted a license to manufacture fluorescent end-use devices under the Switzer patents upon their agreement that they would use the trademark Day-Glo on all end-use devices manufactured and that they would buy their fluorescent materials only from Switzer or from other sources approved in writing by Switzer as a supplier of such materials.

Each agreement in the first and last-mentioned categories required the payment to Switzer of royalties, measured by a percentage of volume of business.

No licenses under the Switzer patents were granted to any end-use manufacturer, except under the licensing agreements hereinabove summarized, and except under label licenses adopted in 1952 which granted to purchasers of Day-Glo materials a royalty-paid license to use "only" the purchased materials in devices covered by the Switzer patents.

All materials manufacturers' licenses, all end-use manufacturers' licenses and all label licenses referred specifically to Switzer patents 2,417,384 and 2,475,529 relating to the manufacture of daylight fluorescent devices. The court found, and that finding is not challenged, that the daylight fluorescent materials manufactured by Switzer and its licensees have substantial non-infringing uses not defined in any claim of those patents.

Beginning in early 1949, Switzer charged non-licensees and all users of non-licensed displays with patent infringement through advertisements and news re-

leases in trade papers and through letters and oral communications. Beginning in latter 1949, the same media and methods were employed to threaten all non-licensed manufacturers and all users of non-licensed devices with patent infringement suits. Suits were commenced in widely scattered parts of the United States against unlicensed dealers in daylight fluorescent materials, manufacturers of end-use devices and users of such devices. Two of those suits, including the instant case, were instituted against appellee's customers. The court found that all of this activity was done in furtherance of Switzer's licensing program.

Appellee was in the target area of Switzer's campaign. Switzer licensees and others were advised that appellee's "Velva-Glo" materials were infringements of Switzer's patents. Appellee's customers were threatened with suit, and ultimately some of them were actually sued. The last was done, as the court found, to deter consumers and prospective consumers from purchasing fluorescent materials produced by appellee.

The court found that the Switzer publications and threats were unauthorized because they purported to claim a monopoly in the whole field of daylight fluorescent displays, were excessive, as Switzer should have known, and were not followed promptly by litigation against all of those to whom they were directed.

Finally, the court found that the Switzer licenses have the effect of lessening competition and creating a monopoly in daylight fluorescent materials, that the individual appellants participated in the illegal acts, that appellee was damaged in respects to be hereinafter noted, that an injunction should issue and that appellants should account to appellee in treble damages as determined by a subsequent accounting.

By its judgment order the court decreed that appellants had misused the Switzer patents and the Day-Glo trademark in restraint of trade in interstate commerce in violation of the antitrust laws. 15 U.S.C.A. §§ 1, 2, 14. An injunction was ordered restraining appellants and each of them:

(a) from granting any license to use the combination claimed by said Switzer patents 2,417,384 and 2,475,529, where such licensed use is directly or indirectly conditioned on purchasing or otherwise obtaining only from Switzer Brothers Inc., or from sources designated by it, any daylight fluorescent materials to be used in such combination, but not patented by such patents;

(b) from selling or offering to sell any daylight fluorescent materials, with an undertaking or understanding that the purchaser will be granted the right to use the combination claimed in said Switzer patents on condition that such daylight fluorescent materials, unpatented with respect to said patents, shall be purchased only from Switzer Brothers, Inc., or from sources designated by it;

(c) from in any way discriminating in the granting of licenses to use the combination claimed in said Switzer patents, in favor of users or proposed users of such combination who purchase daylight fluorescent materials therefor from Switzer Brothers, Inc., or from a source directed by it, and against such users or proposed users who purchase such daylight fluorescent materials from any other sources;

(d) from so using said Switzer patents as to tend to create a monopoly in daylight fluorescent materials not patented by such patents, or in any way, directly or indirectly, misusing such patents, in violation of the antitrust laws of the United States, particularly United States Code, Title 15, Sections 1, 2 and 14;

(e) from bringing suit against or in any way threatening the customers of Radiant Color Company with suits for alleged infringement of said Switzer patents on account of the sale and use of daylight fluorescent materials which have been obtained from Radiant Color Company and are not embraced by the claims of said patents; and,

(f) from making representations that the Switzer patents cover fluorescent materials produced by Radiant Color Company, or devices made from such materials, which are not embraced by the claim of said patents.

The decree also referred the cause to a special master to take and report on accounting of appellee's damages.

Appellants' principal contention for reversal is that Switzer's licensing policy and appellants' practice thereunder was not a violation of the antitrust laws, but was a lawful business practice legitimately pursued. Since the trial court entered findings opposed to that contention, the issue resolves itself into the question whether the findings of fact leading to the judgment that the antitrust laws were violated are supported by the record.

We reject at the outset appellants' contention that we are concerned only with construction of written contracts, and therefore Rule 52(a), Fed.R.Civ.P., 28 U.S.C.A., does not apply. The basic licenses used by appellant tie the right to the use of patents to the use of the Day-Glo trademark, and both to the exclusive use of Switzer produced, or Switzer approved materials. The combination thereof is, *per se*, a violation of the anti-trust laws, *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107, unless the evidence requires a finding that the unique circumstances of the industry required adoption of a tie-in

program, otherwise unlawful, as a legitimate business practice. E.g., *United States v. Jerrold Electronics Corp.*, D.C. E.D.Pa., 187 F.Supp. 545, aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806. Thus, the issue is one to be determined from the record evidence of Switzer practices. That issue depends upon a voluminous record, composed of testimonial and exhibit evidence. Rule 52(a) is particularly applicable to such a record. *International Boring Club v. United States*, 358 U.S. 242, 252, 79 S.Ct. 245, 3 L.Ed.2d 270; *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 596-597, 71 S.Ct. 971, 95 L.Ed. 1199; *Milwaukee Tecnec Corp. v. Loew's Inc.*, 7 Cir., 190 F.2d 561, 564-565, cert. denied 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680.

Upon the question whether the findings are supported by the record, the license agreements themselves support the monopoly findings. The patent licenses were conditioned upon the use of the Day-Glo mark. From Switzer, at the apex, to the more than 4,000 end-use manufacturers at the base of the pyramid of Switzer control established by the licenses, all were required to place the Day-Glo trademark upon all raw materials and end-use devices produced. Each licensee agreed, as a condition of the license, that only materials manufactured by Switzer or approved by it in writing might be used in the production of fluorescent displays. Switzer's licensed manufacturers and dealers were enjoined by their license agreements not to sell to any person other than Switzer licensees.

The evidence apart from the licenses reveals that Switzer refused to sell fluorescent materials to persons other than its licensees, and that no materials were ever approved for use by its licensees except materials produced by manufacturers who held a Switzer license. Appellants' argument that non-licensed materials which

met Switzer quality standards would have been approved after testing by Switzer is refuted by Switzer correspondence conditioning approval upon acceptance of a Switzer license and the payment to Switzer of royalties.

There is ample proof that appellants made excessive and reckless claims of patent infringement in the furtherance of their licensing program. Their patents were limited to certain end-use, combination devices and appellants do not challenge the finding that the basic fluorescent materials had substantial non-infringing uses. Yet, the patents were asserted by appellants as a monopoly on all fluorescent materials and all daylight fluorescent displays. This is demonstrated by evidence of Switzer's position that every fluorescent display which was not marked with the Day-Glo trademark was an infringement of its patents.

The record amply supports the finding and conclusion that the Switzer licensing program was conceived and employed to foster a Switzer monopoly in the daylight fluorescent industry. The licenses required, as a condition for the grant thereof, that the licensee purchase all materials from Switzer, or sources approved in writing by it, not only for production of the patented devices, but also for the production of all daylight fluorescent devices. The grant of the patent license was also conditioned upon the licensees accepting the Switzer Day-Glo trademark. These are precisely the type of tie-in schemes which have been frequently condemned by the Supreme Court. *Automatic Radio Mfg. Co. v. Hazeltine Research*, 339 U.S. 827, 830-832, 70 S.Ct. 894, 94 L.Ed. 1312; *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *Mercoid Corp. v. Minneapolis-Honeywell Reg. Co.*, 320 U.S. 680, 64 S.Ct. 278, 88 L.Ed. 396; *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 64 S.Ct. 268, 88

L.Ed. 376; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852; Cf., *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260.

Appellants attempt to justify their licensing program and activities in furtherance thereof by reference to the principles applied in *United States v. Jerrold Electronics Corp.*, D.C.E.D.Pa., 187 F.Supp. 545, aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806, and *Dehydrating Process Co. v. A. O. Smith Corp.*, 1 Cir., 292 F.2d 653. They urge upon us evidence that appellants had suffered a disastrous experience in Canada from uncontrolled sales of fluorescent materials, and that their licensing program in United States marketing was designed to permit control of the quality and method of use of the materials in order to forestall a repeat of the Canada fiasco.

Appellants' position is without merit. The trial court rejected the evidence now urged upon us, and its failure to enter findings with respect thereto is tantamount to findings adverse to appellants upon the evidence. *Container Patents Corp. v. Stant*, 7 Cir., 143 F.2d 170, 172, cert. denied 323 U.S. 734, 65 S.Ct. 71, 89 L.Ed. 588. Furthermore, the findings entered by the court imply its rejection of the argument now asserted. Even upon the unsatisfactory presentation here,[2] we are convinced that those findings are unassailable.

---

[2] The transcript of the trial comprises almost 4,000 pages of testimony. The appendix presented by appellants is composed of skimpy excerpts from that mass of testimony, and it falls far short of the intendment of our Rule 16(b), 28 U.S.C.A. We have not resolved the appeal upon the basis of the Rule, see *A. O. Smith Corp. v. Pro-Fab Transit Co.*, 7 Cir., 267 F.2d 210, because the appendices presented show beyond doubt that the findings of the court below are sustained by the evidence.

Therein is found a basic point of distinguishing this cause from the *Jerrold* and *Dehydrating* cases. In each of those cases, the trial court found that practices, presumptively in violation of the antitrust laws, were, in fact, a legitimate exercise of business practice. Here, by contrast, the court found upon conflicting evidence that appellants' activities were unlawful both *per se* and in fact. That finding is unassailable in this Court unless it is demonstrated to be clearly erroneous. Fed.R.Civ.P. 52(a), 28 U.S.C.A.

An analysis of *Jerrold* and *Dehydrating* discloses, also, that each is inapposite factually to the case at bar. Jerrold was a new business, pioneering the development of a master television antenna, designed to pick up television signals at a central tower for transmission and distribution by cable to whole communities which were out of the range of normal television reception. Its first sales of equipment were made on an experimental basis before the system was perfected, with Jerrold agreeing to furnish without further charge such new equipment and modifications of equipment as experimental use of the installations might prove to be necessary. Thereafter, Jerrold, who manufactured only parts of the total system, sold its equipment only on a *full-system* basis, with the buyer agreeing that he would buy only equipment approved by Jerrold for repairs or expansion of the system and with the buyer accepting a compulsory service contract under which the equipment would be serviced by Jerrold engineers. The court characterized the tie-in arrangements as, *per se*, unreasonable, but held it to be a legitimate business arrangement at its inception, for the reason that Jerrold was pioneering a new technology, not then perfected, which was likely to succeed and gain public acceptance only if control of the equipment were retained

by Jerrold who was familiar with the technological limitations and problems involved. The court held, however, that continuation of the tie-ins by Jerrold after the system was perfected was an unreasonable restraint and a violation of the antitrust laws.

In the *Dehydrating* case, it was charged that the sales practice adopted by Smith of selling its patented silo-unloading device only for use in its own patented, glass-lined silo was a tie-in prohibited by the antitrust laws. Smith's unloader, installed inside at the bottom of a silo or storage bin, used a sweep arm to direct stored material from storage through a slot in the base of the silo or bin. Successful operation of the unloader required an unimpeded, gravity down-feed of the stored material onto the unloader. When the unloader was first marketed, it was sold by Smith without restriction as to its use. The tie-in policy was adopted some 7 years later, after 50% of Smith's customers, who had purchased the unloader for installation in silos other than Smith's, had complained of malfunctions resulting from construction characteristics of the silos which impeded the free gravity feed of material to the unloader.

The Court of Appeals stressed three points in affirming a judgment for Smith upon a directed verdict, namely, (1) that 50% customer dissatisfaction was substantial evidence of the reasonableness of Smith's policy of selling the unloader only for use in its own silos, (2) that there was no evidence that anyone other than Smith manufactured a silo or storage bin with the specifications necessary for successful use of the unloader; and (3) that Dehydrating had not sustained the burden of proving any damage to it from Smith's sales practice.

As the court pointed out in the *Jerrold* case, a defendant claiming a business reason for tie-in sales, as

opposed to an attempt to restrain trade, has the burden of proving the existence of facts necessary to support his claim. 187 F. Supp. at 560. The court below found, at least by implication, that appellants had not sustained that burden. We agree. There are no factors here present which are comparable to the facts of either *Jerrold* or *Dehydrating* which the courts there felt excused tie-in sales from censure.

The licenses used by Switzer are not properly characterized as trademark licenses as appellants would have us do. The quality-control provisions of the Lanham Act, 15 U.S.C.A. § 1051 et seq., relating to trademark licenses, cannot be construed to condone a violation of the antitrust laws. *Timken Co. v. United States*, 341 U.S. 593, 599, 79 S.Ct. 245, 3 L.Ed.2d 270.

Section 271(c) of Title 35 U.S.C.A., does not justify Switzer's label licensing program as appellants contend. That section applies to components of a patented combination which are "not a staple article or commodity of commerce suitable for substantial noninfringing use." 35 U.S.C.A. § 271(c). Switzer's label licenses tied sales of its materials to the Switzer patents despite the fact that the materials were suitable for substantial noninfringing uses. The trial court found that the label licenses had the effect of restraining trade and fostering a Switzer monopoly in the daylight fluorescent industry. No reason is apparent of record to disturb that finding.

Indeed, appellants' argument on Section 271(c) depends largely upon a misconstruction of the statute, namely, that the Act constitutes a legislative vacation of the rule of the *Mercoid* and other cases that the monopoly of a combination patent extends only to the totality of the combination, and cannot be asserted as a monopoly upon the separate component elements of the combination. That

rule was reaffirmed and applied in the recent case of *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 81 S.Ct. 599, 5 L.Ed.2d 592, 598 (1961). That case removes all arguable validity of the contention now asserted.

One final contention of appellants upon the question of antitrust violations must be briefly mentioned. An antitrust suit filed by the United States against Switzer, Sherwin-Williams and others was terminated by a consent decree entered by the United States District Court for the Northern District of California on October 22, 1953. Appellants urge that decree in refutation of the findings that Switzer's licensing policies still have the effect of lessening competition in the fluorescence industry.

The consent decrees, entered without a trial of the issues in the government suit, enjoined enforcement of the tie-in features of Switzer's licenses and enjoined appellants from engaging in the type of conduct adjudicated in this case. Appellants argue that they have amended their ways in accordance with the restrictive provisions of that decree. On the other side of the blotter, however, the court below, after a trial of some three weeks' duration, found that appellants were still violating the antitrust laws and that appellants' licensing and trade policies still have the effect of lessening competition in the industry. We cannot say on the record before us that those findings are clearly erroneous.

Appellants next contend that the findings that appellee was damaged by appellants' illegal conduct are not supported by the evidence.

Appellants' attack is spearheaded by the argument that the evidence does not support finding 28 that the general public was damaged by appellants' conduct, by

reason of the fact that the public was deprived of an opportunity to purchase fluorescent materials in a free market not affected by appellants' unlawful practice. We reject that argument upon the record, and we note also, that the argument is specious even if the finding of public injury were not supported by the record. Congress has determined that public injury is inherent in every monopolistic practice or restraint of trade in violation of the Sherman Act. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 211, 79 S.Ct. 705, 3 L.Ed.2d 741. In a treble damages action under the Clayton Act the statutory criteria for recovery are satisfied when a plaintiff has alleged and proved an unlawful restraint of trade and damage to himself growing out thereof. *Radiant Burners, Inc. v. Peoples Gas Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358.

Appellants' argument that the evidence fails to show that appellee's loss of sales which is reflected by the record resulted from appellants' unlawful conduct is rejected for two reasons. First, we will not disturb the findings, made upon conflicting evidence, that appellee's sales were restricted as a result of the unlawful conduct. Secondly, we think appellants' contention rests upon a misconstruction of the law which would make injury compensable under the antitrust laws only if the unlawful conduct found to exist stood alone as the causation of the injury. A violation of the antitrust laws is answerable in treble damages for injury to another by the unlawful act even though other factors may have contributed to the injury. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-265, 66 S.Ct. 574, 90 L.Ed. 652; *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 566, 51 S.Ct. 248, 75 L.Ed. 544; *Momand v. Universal Film Exchanges*, 1 Cir., 172 F.2d 37, 43; *William Goldman Theatres, Inc. v. Loew's*

Inc., D.C.E.D. Pa., 69 F. Supp. 103, aff'd 3 Cir., 164 F.2d 1021.

The court below found that both this suit and a suit in Ohio against appellee's customers were instituted in furtherance of Switzer's unlawful licensing program and that appellee's expenses incurred in defending its customers is an element of its damages. That finding is supported by the evidence and is correct in legal principle. *Clapper v. Original Tractor Cab Co.*, 7 Cir., 270 F.2d 616, 623-624, cert. denied 361 U.S. 967, 80 S.Ct. 588, 4 L.Ed.2d 547; *Kobe, Inc. v. Dempsey Pump Co.*, 10 Cir., 198 F.2d 416, 424-425, cert. denied 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651. Expenses incurred by appellee in counteracting Switzer's propaganda and threats to appellee's customers were also properly found by the court as an element of appellee's damages. Cf., *Maytag Co. v. Meadows Mfg. Co.*, 7 Cir., 45 F.2d 299, 302, cert. denied 283 U.S. 843, 51 S.Ct. 489, 75 L.Ed. 1452.

We cannot say that the findings that appellee was damaged by appellants' unlawful conduct are clearly erroneous. The elements of damage found are supported by the record and are elements authorized by law. The reference of the case to a master for a determination of the amount of damages is a proper procedure. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259, 77 S.Ct. 309, 1 L.Ed. 2d 290.

We have considered other contentions of appellants, including the contention that the court erred in dismissing appellants' counterclaim. All are found to have no merit. In appeal No. 13193 the judgment is affirmed.

On the cross-appeal in No. 13194, appellee first contends that the court erred in failing to prohibit Switzer's further use of the trademark Day-Glo, in the manufacture and sale of daylight fluorescent materials. Appellee argues

that the record reveals that the demand for "Day-Glo" marked goods was induced, in part, by fear and not by the usual elements of good will which establishes a trademark. That argument refers to advertisements and representations by Switzer, made in furtherance of its scheme to monopolize the trade, that Day-Glo is "The Mark of Legality in Daylight Fluorescence"; that "The Law is on your Side" when you call for Day-Glo; and that absence of the Day-Glo mark upon fluorescent materials and advertising devices would subject the manufacturer and user to an action for patent infringement. Finally, appellee argues that the mark has an artificial value arising out of appellants' unlawful, coercive conduct which appellants will continue to realize, if permitted to use the mark, because of public identification of the mark as the only lawful mark in the daylight fluorescence industry.

In the light of the whole record, it seems apparent that the "Day-Glo" trademark became, as a result of appellant's unlawful conduct, vested with an artificial value in the fluorescence field over and above the normal incidence of good will. To that extent, appellee's argument does possess logical persuasiveness.

Something more than logical persuasiveness, however, must be shown before a reversal of the court's decision is required. Not the least of the considerations to be taken into account is the drastic nature of the remedy suggested. It seems to us that divestiture of property rights in a trademark, by injunction against the mark's continued use, is a remedy which would seldom commend itself to equity in a private suit under the antitrust laws for injunctive relief and treble damages. Even in the context of suits by the United States to restrain conspiratorial monopolies, divestiture as a remedy is not without

proscription. Thus it is stated that a decree should not penalize by divestiture under "the guise of preventing future violations," *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409, 65 S. Ct. 373, 385, 89 L.Ed. 322, and that the harsh remedy of divestiture should not be employed whenever injunctive relief is adequate to prevent continued wrongdoing. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 77, 31 S.Ct. 502, 55 L.Ed. 619; dissenting opinion of Mr. Justice Frankfurter, *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 335-364, 81 S.Ct. 1243, 6 L.Ed.2d 318. It seems certain to us that divestiture as a remedy in private antitrust litigation should be even more narrowly proscribed, especially in a case such as this where there is lacking a conspiratorial combine of giant economic units of industry[3] and in which the violations stem from the activities of a single supplier of fluorescent materials and its officer-stockholders.

Appellee attempts to support its position by its reference to cases involving conspiratorial combines of large economics forces adjudicated in government antitrust suits. *International Boxing Club v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270; *United States v. Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160. That reference assumes an analogy which does not exist. A distinction must be

---

[3] Examples of that type of situation, in which divestiture was decreed, are *United States v. E. I. Du Pont De Nemours & Co.*, 366 U.S. 316, 81 S.Ct. 1243, 6 L. Ed. 2d 318, *International Boxing Club v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L. Ed. 2d 270, *United States v. Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L. Ed. 663, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 and *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679.

drawn between the conspiracy cases, in which divestiture as a remedy has been considered necessary to restore competition, and this case in which competition may be restored by injunction, and divestiture could only remove a residue of benefit which may yet enure to Switzer from its use of the Day-Glo mark.

We have found no reported case of the Supreme Court which would authorize divestiture as a remedy in the situation at hand, and we could not require divestiture in the absence of convincing reasons why that remedy is necessary to prevent continued violations of the antitrust laws.

It is apparent that the court below felt that continued violations of law could be prevented without enjoining the continued use of the "Day-Glo" trademark. Its decree was drafted accordingly, upon its finding that the excessive claims made by appellants of a monopoly in the fluorescence field were made in good faith without a conscious purpose to violate the antitrust laws. We cannot say that that finding is clearly erroneous or that the decree, formulated by the court to meet the adjudicated exigencies of the case, is not a valid exercise of the large discretion with which the court was vested. E.g., *International Salt Co. v. United States*, 332 U.S. 392, 400-401, 68 S.Ct. 12, 92 L.Ed. 20; *United States v. E. I. Du Pont De Nemours & Co.*, 353 U.S. 586, 607-608, 77 S.Ct. 872, 1 L.Ed.2d 1057.

Finally, appellee contends that finding 29 should be made more specific. The court found that appellee has been directly damaged by Switzer's licensing program in respects enumerated in that finding "and possibly in others". Appellee contends that the finding, as cast, is ambiguous, and that it should include a specific finding

that appellants' unlawful practices forestalled appellee's normal growth in the industry.

We think it unnecessary to disturb that finding. The conclusions of law and the decree do not purport to limit the scope of inquiry upon the trial as to the amount of damages. The cause is referred to the master to ascertain and report an account of "the damages suffered." Since appellee is not restricted in the scope of its proof before the master, it has no cause to complain that finding 29 might have been more specifically cast.

The judgment is affirmed on both the appeal and the cross-appeal.

SUPREME COURT, U. S.

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
OCT 19 1970
ROBERT SEAVER, CLERK

OCTOBER TERM, 1970.

No. 871

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,
Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS.

THOMAS V. KOYKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

October 15, 1970.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS 1

OPINIONS 2

JURISDICTION 3

QUESTIONS PRESENTED 4

STATUTE AND RULES INVOLVED 6

STATEMENT OF THE CASE 7

—The Business Involved 7

—The Damages 8

(i) The prior adjudication has been disregarded 9

(ii) Damages have been awarded for "lost sales" not caused by antitrust violation .. 11

(iii) Damages have been awarded by counting as "lost sales" even merchandise returned as "unsatisfactory"—and then applying multiplying factors to such "lost sales" .. 13

(iv) "Lost sales" award rests on estimates short of standards the law requires—or should 15

(v) If errors in arithmetic alone are corrected, the profit rate on "lost sales" will be 15%, and not the 16% here allowed 16

—The Clearly Erroneous Rule 17

—Attorney's Fee 18

—The Settlement 20

—Treble Damages 20

REASONS FOR ALLOWANCE OF WRIT 22

I. Standards governing damages in private antitrust suits desperately need to be clarified 22

—(a) Award disregards adjudicated findings .. 22

—(b) Award includes losses not caused by antitrust violation 22

—(c) Award counts as "lost sales" goods returned because customers found the product was "unsatisfactory" 22

—(d) Award substitutes for appraisal by the owners, estimates by experts 23

—(e) Award converts mistakes in arithmetic into damages 23

II. Clearly erroneous rule has been misapplied 23

III. Standards governing attorney's fee allowances in private antitrust suits need to be declared ... 23

IV. Joint tortfeasor rule should be held to apply to antitrust actions 23

V. Whether statute requires damages to be trebled should be determined 23

CONCLUSION 24

APPENDIX (Separately printed):

OPINION OF WHICH REVIEW IS SOUGHT, adjudicating antitrust damages, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp. (formerly Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer* (7 C.A., 1970), 429 F.2d 873 ---------- 1

JUDGMENT OF WHICH REVIEW IS SOUGHT, entered June 26, 1970 ---------- 23

ORDER DENYING REHEARING, entered September 15, 1970 ---------- 24

OPINION OF THE DISTRICT COURT, entered by Judge Decker, affirmed in the judgment of which review is sought ---------- 25

JUDGMENT ENTERED BY THE DISTRICT COURT, Judge Decker, and affirmed in the judgment of which review is sought ---------- 31

FINDINGS OF FACT AND CONCLUSIONS OF LAW entered by Judge Miner in the original action, finding antitrust violation ---------- 34

JUDGMENT ENTERED BY JUDGE MINER in the original action adjudging antitrust violation ---- 47

OPINION OF THE COURT OF APPEALS affirming Judge Miner's decision, adjudging antitrust violation, *Switzer Brothers, Inc., Robert C. Switzer v. Locklin and Brant, d/b/a Radiant Color Company* (7 C.A., 1961), 297 F.2d 39 ---------- 51

TABLE OF AUTHORITIES.

Cases.

Bigelow (1946), 327 U.S. 251 22

Cicero Amusement Co. v. RKO Radio Pictures (N.D. Ill., 1953), CCH 1953 Trade Cases, ¶ 67,520 21

Eastman Kodak (1927), 273 U.S. 359 22

Haskell v. Perkins (D.C. N.J., 1928), 28 F.2d 222, reversed on other grounds (3 C.A., 1929), 31 F.2d 53, certiorari denied (1929), 279 U.S. 872 21

Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp., CCH 1969 Trade Cases ¶ 72,705 2

Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp. (7 C.A., 1970), 429 F.2d 873, CCH 1970 Trade Cases ¶ 73,241, 166 U.S.P.Q. 164 2

Rogers v. Douglas Tobacco Board of Trade, Inc. (5 C.A., 1957), 244 F.2d 471, certiorari denied (1959), 361 U.S. 833 21

Story Parchment (1931), 282 U.S. 555 22

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (7 C.A., 1954), 213 F.2d 284 21

Switzer Brothers, Inc. v. Locklin and Brant, d/b/a Radiant Color Company (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851 ..... 3, 8

Zenith Radio (1969), 395 U.S. 100 22

Statutes.

15 U.S.C. 1 (Sherman Act, Sec. 1) ---------- 1-2
15 U.S.C. 2 (Sherman Act, Sec. 2) ---------- 1-2
15 U.S.C. 14 (Clayton Act, Sec. 3) ---------- 2
15 U.S.C. 15 (Clayton Act, Sec. 4) ---------- 6, 7, 12, 20
28 U.S.C. 1254(1) ---------- 3
28 U.S.C. 1337 ---------- 7

Federal Rules of Civil Procedure.

Rule 52(a) ---------- 5, 6
Rule 53(e)(2) ---------- 5, 6

Other.

CCH *Trade Regulation Reports*, No. 473, July 6, 1970, page 5 ---------- 7

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,
Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI BY DAY-GLO COLOR CORP., ROBERT C. SWITZER AND JOSEPH L. SWITZER, PETITIONERS.

Now come petitioners, Day-Glo Color Corp. (formerly known as Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer, brothers, sole shareholders in said corporation, and petition this Court to grant its writ of certiorari to review the judgment entered by the United States Court of Appeals for the Seventh Circuit, in cause No. 17,730, determining damages payable by petitioners Day-Glo, *et al.*, to respondents Radiant, *et al.*, in a private antitrust suit. The adjudicated antitrust violation (of Sections 1 and 2 of the Sherman Act

and Section 3 of the Clayton Act, 15 U.S.C. Sections 1, 2, 14) was a misuse of two Switzer patents and its Day-Glo trade-marks by Switzer's grant of licenses under the patents, conditioned on the purchase of needed, but unpatented, fluorescent materials from Switzer or from sources designated by Switzer.

OPINIONS.

The questions this case brings here for review spring from:

Opinion of the United States Court of Appeals for the Seventh Circuit, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp.* (7 C.A., 1970), 429 F.2d 873, CCH 1970 Trade Cases ¶ 73,241, 166 U.S.P.Q. 164, entered by District Judge Grant, Chief Judge Swygert and Circuit Judge Kiley, affirming the determination of antitrust damages, reproduced in the Appendix hereto, printed under separate cover, page 1.

Opinion of the District Court, Judge Decker, in the Northern District of Illinois, *Locklin and Brant, d/b/a Radiant Color Company v. Day-Glo Color Corp.* CCH 1969 Trade Cases ¶ 72,705, affirming the report of the special master assessing damages, reproduced in the Appendix hereto, page 25.

Findings of Fact and Conclusions of Law, entered in the original action by Judge Miner in the Northern District of Illinois (adjudicating the antitrust violation for which damages are now awarded), reproduced in the Appendix, page 34.

Judgment entered by Judge Miner, adjudicating the antitrust violation and referring the case to a master, reproduced in the Appendix hereto, page 47.

Opinion of the United States Court of Appeals for the Seventh Circuit in the original action, affirming Judge Miner's decision, adjudicating the antitrust violation, *Switzer Brothers, Inc. v. Locklin and Brant, d/b/a Radiant Color Company* (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851 (by District Judge Mercer and Circuit Judges Schnackenberg and Kiley), reproduced in the Appendix hereto, page 51.

JURISDICTION.

The judgment sought to be reviewed is dated, and was entered, June 26, 1970. (App. p. 23.)

Petition for rehearing was denied by order dated, and entered, September 15, 1970. (App. p. 24.)

This Court has jurisdiction to review by writ of certiorari pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

This case presents the questions:

1. Whether erroneous standards for measuring antitrust damages have been declared, and applied, particularly:

(a) Whether, after it has been adjudicated that specific items of damage, in specific time periods, resulted from antitrust violation, damages may be allowed in disregard of such adjudication.

(b) Whether damages may be allowed not only for "lost sales" resulting from the antitrust violation, but also for sales "lost" from causes unrelated to the antitrust violation.

(c) Whether calculation of "lost sales" may be based on "gross sales" where the effect is (i) to treat as sales "lost," goods returned by purchasers because they found the wares "unsatisfactory," and (ii) to include nonrelevant items in the calculation (such as credits, allowances, and sales of unrelated products) as if they were "sales" lost by the antitrust violation, and where, moreover, the errors thus introduced are then ballooned by applying multiplying factors to these items.

(d) Whether "estimates" (by accountants unacquainted with the business) based on such use of "gross sales," satisfy the standards of proof required to establish antitrust damages.

(e) Whether, when damages are calculated on "lost sales," a judgment based on a profit of 16% on such sales may be upheld (i) when correction

of mathematical errors alone (but accepting every other determination) produces 15%, and (ii) when, in the five-year period after the master found all effects of the antitrust violation terminated, the claimant earned 10%.

2. Whether Rule 52(a) (that a master's findings, to the extent adopted by the court, shall be deemed findings of the court), and Rule 53(e)(2) (that the court shall accept the master's findings "unless clearly erroneous") have been misconstrued and misapplied.

3. Whether attorney's fees in a private antitrust case (i) may be granted for issues lost, or (ii) may be based on the factfinder's judgment, where the claim is unsupported by contemporary records (except in a few instances) and rests upon allocations made from old charges and invoices, on the basis of recollection of events going as far back as ten years.

4. Whether settlement by an antitrust claimant of claims against a co-conspirator, without reserving rights against others, operates as a matter of law (in an antitrust case, as in others) to discharge also claims against all other joint participants in the same wrong.

5. Whether damages under the antitrust law must be trebled even where, as here, the violation is found by the court to have been without malice, without conscious purpose to violate the antitrust laws, and in the good-faith belief that the program followed was warranted by the patent and trademark laws of the United States.

STATUTE AND RULES INVOLVED.

The case turns on Section 4 of the Clayton Act (Act of October 15, 1914, Chapter 323, Section 4, 38 Stat. 731, 15 U.S.C. 15), which says:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Also involved is the construction of Rule 52(a) of the Federal Rules of Civil Procedure, which, so far as here material, says:

> "The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court"

and Rule 53(e)(2), which, so far as here material, says:

> "the court shall accept the master's findings of fact unless clearly erroneous."

STATEMENT OF THE CASE.

This is a private antitrust suit, brought in the District Court under 28 U.S.C. 1337 and 15 U.S.C. 15. It comes here on the issue of damages, liability having been heretofore adjudicated, and presents important questions concerning standards by which damages are to be measured. They are questions of obvious and immense importance in all antitrust actions.

The nature of the case is indicated by the summary published by the editors of the Commerce Clearing House *Trade Regulation Reports*, who compressed the holding below into this sentence:

> "Imprecision, erroneous factors, inconclusive evidence, and the use of gross sales in calculating lost profits did not spoil the judgment." [1]

Before turning to see how this has come about, it will be useful to note—

—The Business Involved.

The parties are engaged in the development, manufacture, and marketing of daylight fluorescent colors. Such colors have the quality of intensifying the reflection of sunlight, producing a brilliance up to four times that of ordinary colors. The products are marketed chiefly in the form of:

1. Silk screen colors utilized by silk screen printers and also frequently seen in emergency warning signs, policemen's gloves, advertising posters, and the like, and
2. Paper coated with daylight fluorescent colors used chiefly in advertising.

---

[1] CCH *Trade Regulation Reports*, No. 473, July 6, 1970, page 5.

The Switzer brothers (partners, and then the sole shareholders of Switzer Brothers, Inc., now by change of corporate name known as Day-Glo Color Corp.) pioneered in this area, and produced a product new to the world. Previous experience in initially launching their business in Canada, the Master found, led the Switzers, in starting their business in this country, "to conclude that a licensing program was necessary" (MR p. 24 ¶ 4)[2] to assure the satisfactory use of their discoveries. It turned out that the licensing program (carried out under guidance of counsel) was adjudged a prohibited "tie in" in violation of the antitrust laws. *Switzer Brothers, Inc. v. Locklin* (7 C.A., 1961), 297 F.2d 39, certiorari denied (1962), 369 U.S. 851.

That is now water over the dam. The case comes here on subsequent proceedings for assessment of—

—The Damages.

The damages awarded by the judgment below were determined by a master, affirmed by Judge Decker in the District Court in Chicago (to whom the case was assigned following the death of Judge Miner who heard the original case and referred it to a master), and affirmed by the Court of Appeals for the Seventh Circuit in the decision of which review is sought.

The original judgment entered by Judge Miner (and affirmed on appeal in the prior proceedings) determined that five items of damage resulted, *viz.*:

Finding 29: "Radiant Color Company has been directly damaged by the Switzer license program

---

[2] The designation MR indicates Master's Report.

> *in the respects* noted in Findings 30 to 34 below, and possibly in others." [3] (App. p. 43.)

The five items of damage thus adjudicated were (1) expense in counteracting the Switzer program, (2) expense in defending a customer in Chicago in Switzer's patent infringement suit, (3) expense in defending a customer in Cleveland in Switzer's patent infringement suit, and—two more, defined in Judge Miner's Findings 33 and 34. These two items adjudged:

> Finding 33: "*Commencing shortly after June 5, 1952*, Radiant's market in Velva-Glo paper became depressed * * *."
>
> Finding 34: "*Commencing shortly after February 9, 1953*, Radiant's market in Velva-Glo silk screen colors became depressed * * *." (App. p. 43.)

With respect to the first three items of damage, Judge Miner fixed both the commencement date and the termination date of damages; on the last two items—which account for the bulk of the damages awarded, and on which the erroneous standards of measurement applied below took effect—Judge Miner fixed the date when Radiant's market for paper became depressed (1952), and when Radiant's market for silk screen color became depressed (1953), but did not fix the termination dates. (App. p. 43.)

(1) The prior adjudication has been disregarded.

The master disregarded the adjudicated commencement dates of 1952 and 1953 in awarding damages for

---

[3] Emphasis supplied throughout except as otherwise indicated.

asserted "lost sales" of paper and silk screen colors. On these items the master instead awarded damages *"Commencing January 1, 1949"*—and ending December 31, 1956.

The award gives Radiant damages Judge Miner rejected. Judge Miner *refused to make the following finding requested by Radiant:*

> *"Commencing January 1, 1949,* and continuing down to the present date the false publicity of Switzers and the threats of patent infringement litigation have forestalled the normal growth of business of Radiant, and Radiant has lost the normal profit on such business." (R. 1852.)

Instead, Judge Miner found—and all courts affirmed —that damages did not commence until 1952 (with respect to paper) and 1953 (with respect to silk screen colors).

Moreover—and this makes the scuttling of the adjudicated findings of the prior appeal all the more remarkable—Radiant took a cross appeal in the prior proceedings, *but did not appeal—indeed, did not mention—Judge Miner's rejection* of Radiant's requested finding that its business was damaged "Commencing January 1, 1949 * * *." Instead, Radiant complained:

> "there is some room for ambiguous construction by the Master in the language 'possibly in others' used [by Judge Miner] in Finding 29." [4]

The Court of Appeals, in the prior proceedings, affirmed Judge Miner's findings fixing the 1952 and 1953 commencement dates, and disposed of Radiant's cross appeal by pointing out that Judge Miner's findings:

> "do not purport to limit the scope of inquiry upon the trial *as to the amount* of damages." (App. p. 70)

---

[4] Radiant's brief in support of its cross appeal in the prior proceedings, pages 99-100.

and that, since Radiant is not restricted in the scope of its proof as to the amount of damages, it "has no cause to complain that finding 29 [with its assertedly ambiguous "possibly in others" language] might have been more specifically cast." 297 F.2d at 49. (App. p. 70.) The court did not modify, but instead *affirmed*, Judge Miner's Findings 33 and 34—adjudging that Radiant's market for paper and silk screen colors "became depressed" commencing in 1952 (for paper) and 1953 (for silk screen colors).

Despite these findings, damages have been awarded for "lost sales" of these products "commencing January 1, 1949"—three and a half years earlier (in the case of paper) and more than four years earlier (in the case of silk screen colors) than was adjudicated in the prior proceedings.

(ii) Damages have been awarded for "lost sales" not caused by antitrust violation.

With respect to silk screen colors, the master found, and the Court of Appeals agreed:

> "the record shows that Radiant limited its market [by contract before it began business and before any act by Switzer], did not offer silk screen until the third year of the damage period, had no intent to enter the silk screen market, produced a defective product which had to be withdrawn, finally produced acceptable silk screen but it was inferior to Switzer's, and later achieved product equality with Switzer but only by infringing the latter's patent [a patent covering resins utilized in making daylight fluorescent colors and in no way involved in the original litigation]." (App. p. 13.)

With respect to coated paper the master found, and the Court of Appeals agreed:

"the record shows that Radiant was without competition for the first three years of the damage period [because Switzer marketed no paper until it licensed Crocker-Burbank which got into production in 1952], lost part of the market due to a third party competitor [i.e. Crocker-Burbank] which had a better product and distribution system complemented by lower prices, recaptured some of the market only by infringing on patents, and strained its production facilities to the breaking point, resulting in customer complaints and order cancellations for late delivery which further deteriorated its distribution network." (App. pp. 13-14.)

The master found the damages awarded "resulted from

(1) Switzers' unlawful conduct *and*

(2) the contributing factors of Radiant's production and sales problems" (MR p. 140, ¶ 10)

and put the question:

"In determining the *amount* of that *damage* do we sever (1) and (2)?" (MR p. 140, ¶ 10.)[5]

The master answered: "I think not." (MR p. 140, ¶ 10.)

Surely the master erred. Surely a mistaken standard has been applied. Surely damages resulting from the claimant's own problems must be separated from damages resulting from the antitrust violation. Surely only such damages may be allowed as are incurred "by reason of" acts "forbidden in the antitrust laws * * *." 15 U.S.C. 15.

---

[5] The emphasis is the master's.

(iii) Damages have been awarded by counting as "lost sales" even merchandise returned as "unsatisfactory"—and then applying multiplying factors to such "lost sales."

How "defective"—as the Court of Appeals put it—was the product offered by Radiant, may be judged from the fact that Radiant's general silk screen market customers *returned, as "unsatisfactory," 44.8% of the silk screen colors* Radiant sold in 1953 and *44% in 1954*—in the fifth and sixth years of the master's "lost sales" awards (R. 1795)—before Radiant had achieved, as the master and the Court of Appeals put it, "equality with Switzer." (App. p. 13.)

The sales so undone—because customers found the product "unsatisfactory"—*are treated as "lost sales"* in the damage award. This is because the master made his calculations of "lost sales" (during the first six years of his eight years of "lost sales") on the basis of Radiant's *gross sales*. The gross figures so used were swollen *by six categories of nonrelevant items*—including goods returned by customers as "unsatisfactory"—thereby increasing the "lost sales" damages awarded. The Court of Appeals said:

> "Net sales *would have excluded* six types of items—credits, returns, allowances, products other than daylight fluorescent products, government sales, and foreign sales." (App. p. 16.)

The calculation is even worse. To gross sales the master *applied a multiplying factor* to arrive at what, "but for" Switzer, would have been Radiant's sales. For example, the master determined Radiant's sales "but for" Switzer in 1949 (in Radiant's first year of business) *by multiplying* Radiant's *gross sales* in that year by 2½. Since the multiplier was applied to *gross* sales, every erroneous inclusion, *even of returned merchandise*, was thereby

multiplied, and the thus inflated figure treated as "lost sales."

In the last two years—of the eight years of "lost sales"—the master, without explanation, switched to a different method of computation. He rejected what Radiant's estimators of damage had said, and on his own, without support anywhere in the record, ruled that in those years Radiant's sales, "but for" Switzer, would have equalled Switzer's—to the penny. In making the computation on the new method, the master computed Radiant's "lost sales"—in these years—*as being the exact difference between Radiant's sales and Switzer's.* However, in measuring the difference (to be awarded to Radiant as "lost sales") the master took, not Radiant's *gross* sales (which he had used in the first six years when he determined "lost sales" by applying multiplying factors to *gross* sales), but instead started with the *lower* figure represented by Radiant's *net sales.* This made the difference greater. Had the master continued to use Radiant's gross sales—instead of switching in these years to *net* sales for Radiant—the difference between Radiant's *gross* and Switzer's *net* sales [6] would have produced a smaller amount of so-called "lost sales."

Thus, *both* methods used by the master operate to inflate the "lost sales" award. Neither accords with any permissible standard of measuring damages. Each opens an easy road to antitrust riches.

---

[6] Throughout the computation, in referring to Switzer's sales, the master used *net sales for Switzer* even while using *gross sales for Radiant.*

(iv) "Lost sales" award rests on estimates short of standards the law requires—or should.

The owners of Radiant's business, Locklin and Brant, were not permitted by their counsel to testify to the damage suffered. It was obvious that their views were not in accord with the testimony of their "experts." When the master observed "neither one of your clients here made any estimates" of damage (R. 1429), counsel replied "that was done deliberately and intentionally * * *." (R. 1429.) Counsel explained:

> "As a matter of fact, their judgment, if I were to use their estimate, *their judgment in this is so ridiculous* as to what they would have done, *that your Honor couldn't believe it.* Mr. Locklin, in 1951 said, 'We can't do any more business than we are,' and his sales went up later.
>
> In 1953, he said, 'We are not hurt,' whereas the sales curve showed they were hurt.
>
> Mr. Locklin and Mr. Brant were just people making and selling this paint. I submit that neither of them had as much competency to testify as to what their business was than these experts. *They constantly said and constantly thought that they weren't being hurt.*" (R. 1430.)

Damage, obviously, was in the minds of the "experts" only—it was not in the minds of the principals, the owners of Radiant's business.

Of the three "experts" offered by Radiant, the master rejected one outright, and relied on the other two—accountants who had no experience in, or knowledge of, the business, and based the estimates they gave on reading the decision and Appendix on the prior appeal. This reading produced "lost sales" that continued to grow the greater the lapse of time since the termination of the antitrust violation.

The master accepted the "lost sales" figures of one of Radiant's experts for two of the years and of the other expert for four years (and made up his own for the remaining two years). However, the estimates the master accepted:

1. Radiant's "experts" said they rested on assumptions the master found not true, and

2. Were built by Radiant's "experts" from, and supported only by, figures for other years which the master rejected.

The nearest parallel is in ancient maps which show the world resting on the shoulders of Atlas, and Atlas standing on—nothing.

(v) If errors in arithmetic alone are corrected, the profit rate on "lost sales" will be 15%, and not the 16% here allowed.

In the five years after the master found all effects of the antitrust violation ended, Radiant earned 10% on sales.

In computing damages, the master allowed 16% on what he called "lost sales."

If every determination made by the master is accepted, and his method of calculating the 16% is followed precisely, and errors in arithmetic alone corrected, the result will be a profit rate of 15%—not 16%.

The foregoing considerations show compelling need for a statement of standards to be applied in measuring antitrust damages. They reveal also need for clarification of the duty laid on reviewing courts by—

—The Clearly Erroneous Rule.

The circumstance that findings come with the formidable support given them by Rules 52(a) and 53(e)(2), *makes it the more important* that at some stage some court determine, as a judicial matter, whether they meet that test.

Here there has been no such review.

In a small business, where, *in the eight years* covered by the award, Switzer's sales totalled *$4,155,517.62*, it now is adjudged that Radiant "lost sales" of *$1,966,600*, and the judgment amounts to *$1,145,387.73*. This attributes to Radiant in the first eight years of its business, which began January 1, 1949, with "two years of preparation" (App. p. 2), *sales $313,983 greater than Switzer managed to achieve in the same period after "fifteen years of preparatory work"* with fluorescent colors. (App. p. 2, MR p. 184 ¶ 85; R. 1464, 1472, 1812.)

This is a measure of the extravagantly swollen character of the "lost sales" award.

The District Court considered its obligation under the Rule discharged on the ground:

> "I am going to have to rely on the Master's—the Master heard the witnesses and he had the documentary evidence and he has carefully gone over it." [7]

The Court of Appeals, assuring the parties they "are entitled to a real review" (App. p. 4), *did not even correct mistakes in arithmetic*; it remained unmoved by the "numerous flaws and inconsistencies" (App. p. 18) of the judgment that cry for correction, if review is to be more than empty farce.

---

[7] Hearing before the District Court on January 24, 1969, page 37.

Consider that here is a case where:

$275,328 is written into the judgment by calculating "lost sales" (in the first six years) on the basis of *gross* sales—treating as sales "lost" even merchandise returned by customers because it was "unsatisfactory"—and then applying multiplying factors thereto, year by year, that further inflate the error.

$68,400 is added to the judgment by the switch to a different, and equally indefensible, method of computing "lost sales" in the seventh and eighth years—measuring this time from Radiant's *net* sales in the manner described, guaranteeing inflation of the award.

$58,998 is written into the judgment by mistakes in arithmetic—by which the master arrived at the 16% profit rate.

$226,992 is added to the judgment by awarding damages for asserted "lost sales" of paper and silk screen colors in 1949-1951 even though the prior adjudication determined damages did not commence on these items until 1952 and 1953.

These items alone account for *more than half of the judgment*, i.e., $629,718 out of the total judgment of $1,145,387.73.

—Attorney's Fee.

Included in the judgment are attorney's fees totaling $198,201. (App. p. 9.) Under counsel's contingent fee arrangement (R. 1541), counsel's portion will exceed a quarter million dollars. (One must say counsel who can

support this judgment by the rope of sand that is this record deserves to be paid on that order of magnitude.)

The allowance includes pay for work on issues unnecessary to the litigation, and that, to boot, were lost. The trial before Judge Miner took three weeks; of these two weeks (R. 405) were devoted to Radiant's effort to prove "that the Switzers were guilty of bad faith and were guilty of malice" (R. 404). When Judge Miner questioned the point, counsel conceded it was not necessary to prove this. (R. 404.) But counsel persisted.

After two weeks of effort, Radiant lost the point. Judge Miner found Switzer acted:

> "without malice or bad faith" (Finding 20, App. p. 39)

and the Court of Appeals agreed Switzer's conduct was:

> "in good faith without a conscious purpose to violate the antitrust laws." (297 F.2d at 49, App. p. 69.)

Now counsel is paid for spending two-thirds of the trial in losing the issue. To impose such a penalty for warding off charges adjudged to be groundless is not in the interest of the antitrust laws.

The fees allowed, moreover, are based on allocations of time charges, made from recollection going back as much as ten years. The Court of Appeals knew of "no rule which requires the master to make a finding only on contemporary records * * *." (App. p. 9.) Such records could have been kept—for they were in a few instances. (R. 373, 420, 426.)

If, as the Court of Appeals determined, there is no rule, this Court should see to it that there is one—where immense sums are to be claimed.

Observe next—

—The Settlement.

Radiant sued Sherwin-Williams and others in California as joint participants with Switzer in the same wrong for which damages are here awarded. Radiant settled its claims against Sherwin-Williams without reserving rights against the other defendants in the California action or against Switzer.

The master found, and the Court of Appeals agreed:

> "The California conspiracy suit involved the same wrongs here asserted, Sherwin-Williams would do no business with Radiant until the law suit was dismissed, the former making it clear that a one-year supply contract for Radiant's pigments would be waiting upon dismissal, Radiant dismissed the suit 'in anticipation of' the supply contract, and the contract was executed." (App. p. 7.)

From these findings only one conclusion can follow: Radiant settled its claims against Sherwin-Williams. When it did so without reserving rights against others, its claims against other joint tortfeasors, on the facts found, vanished by operation of law.

—Treble Damages.

The statute says a person injured by anything forbidden in the antitrust laws "shall recover threefold the damages by him sustained * * *." 15 U.S.C.15.

The question whether damages must be trebled, willy-nilly, has never been ruled on by this Court. There is, of course, a great deal of language in the cases about award of treble damages but—so far as can be found—never in response to challenge on this point.

The question has been expressly raised only in the lower courts. The result is an even division of authority.

In the Courts of Appeals (prior to this case), the Fifth and Seventh Circuits split, *viz.*:

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (7 C.A., 1954), 213 F.2d 284, Judges Lindley, Major and Duffy held the statute *requires* treble damages, but, in

Rogers v. Douglas Tobacco Board of Trade, Inc. (5 C.A., 1957), 244 F.2d 471, certiorari denied (1959), 361 U.S. 833, Judges Rives, Hutcheson and Brown held the statute *does not require* trebling in every case.

Similarly, in the District Courts, there is an even division, *viz.*:

Cicero Amusement Co. v. RKO Radio Pictures (N.D. Ill., 1953), CCH 1953 Trade Cases, ¶ 67,520, Judge LaBuy held the statute *requires* treble damages, but, in

Haskell v. Perkins, (D.C. N.J., 1928), 28 F.2d 222, reversed on other grounds (3 C.A., 1929), 31 F.2d 53, certiorari denied (1929), 279 U.S. 872, Judge Runyon held the statute *does not require* trebling in every case.

REASONS FOR ALLOWANCE OF WRIT.

The Court should grant the writ because the judgment below shows:

I. Standards governing damages in private antitrust suits desperately need to be clarified. This Court has had occasion to deal at length with substantive offenses under the anti-trust laws; it has not dealt with standards governing the award of damages since *Eastman Kodak* (1927), 273 U.S. 359, *Story Parchment* (1931), 282 U.S. 555, *Bigelow* (1946), 327 U.S. 251, and *Zenith Radio* (1969), 395 U.S. 100—and, even then, not at all with the bread and butter problems that flow from this record. The judgment below dramatizes need for guidance. Consider that the judgment in this case:

—(a) *Disregards adjudicated findings* of the prior proceedings, raising question whether findings are to be deemed good only on the day of judgment—and thereafter left at large.

—(b) *Includes losses not caused by antitrust violation,* but produced by the claimant's own deficiencies. The master found:

> "That Radiant had serious product and sales problems in the silk screen and coated paper business during the period in question is amply supported by the record" (MR p. 141 ¶ 12)

and then held Switzer must pay for losses so caused.

—(c) *Counts as "lost sales" goods returned because customers found the product "unsatisfactory."* The master found the product was withdrawn from the market because of its quality deficiencies. To such items, and others having no relation to antitrust violation, the award applies multiplying factors that further inflate damages unconscionably.

—(d) *Substitutes for appraisal by the owners, estimates by "experts"* whose knowledge of the business came from reading portions of the record. Money should not be so "estimated" from one man's pocket into another's.

—(e) *Converts mistakes in arithmetic into damages.* Something is amiss when mistakes in adding figures become damages.

Such departures from the accepted and usual course of judicial proceedings should not be countenanced. They reveal imperative need for specification of standards to be observed in counting anti-trust damages.

II. Clearly erroneous rule has been misapplied. This Court should make clear that the rule is *not* a device to relieve courts of the need for review, but, instead, requires that somewhere, some court, judicially consider whether the findings meet the test. Findings that are, as here, at war, one with another, do not pass that test.

III. Standards governing attorney's fee allowances in private antitrust suits need to be declared. It should not be left to the finder of the facts to exercise his judgment when the claim is based on allocations made from recollection, nor should allowance be made for work in losing issues.

IV. Joint tortfeasor rule should be held to apply to antitrust actions equally with others. The point has not been ruled on by this Court. It should be. The findings establish the settlement. All that remains is to apply the rule.

V. Whether statute requires damages to be trebled should be determined. This Court has not ruled on the point; below, four courts have dealt with the question, and have divided two to two.

CONCLUSION.

This case brings here questions immensely important in the administration of the antitrust laws. They need the attention of this Court.

Respectfully submitted,

THOMAS V. KOYKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

October 15, 1970.

Subject Index

	Page
Questions presented	2
Statement of case	2
Reasons for allowance of writ	6

Table of Authorities Cited

Cases

	Page
Bigelow v. RKO Radio Pictures (1946), 327 U.S. 251	7
Eastman Kodak Co. v. Southern Photo Co. (1927), 273 U.S. 359	7
Story Parchment Co. v. Paterson Co. (1931), 282 U.S. 555	7
Zenith Corp. v. Hazeltine (1969), 395 U.S. 100	7

Statutes

15 U.S.C. 15	6

ABBREVIATIONS USED IN THIS BRIEF

(App . . .), when used with arabic numerals, refers to Appendix to Petition for Certiorari filed by Day-Glo Color Corp. et al. in number 871 of the October term, 1970, and pagination to that appendix.

(MR . . .) refers to the Report of the Special Master underlying the judgment sought to be reviewed and pagination to that report.

(Petition . . .) refers to Petition for Certiorari in No. 871 and pagination to that petition.

In the Supreme Court
of the
United States

October Term, 1970

No. 871

Day-Glo Color Corp. (formerly Switzer Brothers, Inc.), Robert C. Switzer and Joseph L. Switzer,

Petitioners,

vs.

Harry P. Locklin and Elmer J. Braun, general partners doing business under the firm name of Radiant Color Company,

Respondents.

BRIEF IN OPPOSITION

The petition presents no question warranting this Court's attention and the complaints which it urges are without substance. Petitioners raise no question of interest to the general public. Instead, the issues are routine and relate almost entirely to the controversy between the parties. Adequate standards for the resolution of these issues have been announced by this Court and other courts as well and have been rightfully followed in this case.

The petition properly describes the opinions below and the basis for jurisdiction of this Court (Petition 2-3), together with the statute and rules involved (Petition 6). In other areas a restatement is required.

QUESTIONS PRESENTED

Questions 2 and 5 alone are stated with objectivity. Questions 1, 3 and 4 (Petition 4-5) are argumentative and include within their ambit assumptions of factual premises which have been thrice held either unproved or overcome by other salient factors. Questions 1, 3 and 4 are restated below.

1. Whether proper standards for measuring antitrust damages were declared and applied in the light of the record taken as a whole in this case.

3. Whether the attorneys' fees awarded in this private antitrust case are reasonable based upon the record as a whole.

4. Whether a dismissal without prejudice by an antitrust claimant of a co-pending action against a co-conspirator operates as a matter of law to discharge a prior judgment obtained by that claimant against other joint participants in the same wrong.

STATEMENT OF CASE

Respondents' claim against petitioners for damages arising under the antitrust laws was tried in two installments. The issues of violation and liability were tried first. That trial culminated in a judgment that petitioners vio-

lated the antitrust laws and that respondents were entitled to damages (App 47-50). The judgment was affirmed on appeal (App 51-70) and this Court denied certiorari (App 3).

The District Court referred the damage issues to a special master (App 3). Forty-three days were spent in presenting evidence and argument to the master, the record amounting to 9,000 pages of documents and testimony (App 4). Prior to filing a 231-page printed report, the master submitted a draft report and conducted hearings on the suggestions of the parties (MR 13-14). After that first review of petitioners' contentions, the master filed his printed report in which he found single damages in the amount of $356,792.91 and reasonable attorneys' fees in the amount of $75,000 (MR 217-218).

The District Court adopted the master's report in toto (App 31-33) and entered judgment for $1,070,378.73 as treble damages and for $75,000 as reasonable attorneys' fees (App 32). Petitioners and respondents both appealed from that judgment, petitioners complaining that the damages were excessive (App 6-30) and respondents complaining that the award was inadequate (App 4-6). The Court of Appeals affirmed in all respects (App 23).

With regard to general damages, petitioners urge, point (i), that prior findings of the District Court precluded a general award of damages (Petition 8-11 and 22). This same point was made to the master, the District Court and the Court of Appeals and was found to be wholly without merit (MR 16-19, App 29-30, App 15-16). The discussion of the Court of Appeals to the point

(App 15-16) considers petitioners' complaint in full detail and concludes (App 16) that "Switzer's interpretation of the findings seems strained".

Petitioners next state, point (ii), that damages have been awarded for lost sales not caused by antitrust violation (Petition 11-12, 22). This same argument was made to the master, the District Court and the Court of Appeals and was rejected on the basis of the record as a whole (MR 136-183, App 31, App 13-15). The Court of Appeals' decision is direct and to the point (App 13-15). Reviewing the record as a whole, the Court of Appeals held that "If the master allowed Radiant damages for losses which were not caused by Switzer, reversal is required." (App 14); reviewed the record as a whole (App 14-15); and concluded that "The master was correct in determining that Radiant's lost sales were 'caused' by Switzer" (App 15).

Petitioners' point (iii) that there was error in using gross sales instead of net sales (Petition 13-14, 22) is another issue upon which petitioners have already secured several reviews. The Court of Appeals gave special attention to petitioners' point (App 16-17) and concluded that "the master took an extremely conservative approach, giving Switzer the benefit of any doubt. No just cause for complaint has been shown . . ." (App 17).

The Court of Appeals made similar disposition of petitioners' point (iv) complaining of the estimates (Petition 15-16, 23). The Court of Appeals carefully analyzed the expert testimony (App 18-20) and found that the master's determination was quite conservative (App 20). And indeed it was. One of the experts esti-

mated that Radiant experienced lost sales of $3,361,100 upon which the profits would have been $630,900 and the other estimated that Radiant lost sales of $3,657,100 upon which Radiant lost profits of $686,300 (MR 171-172). The master found that lost sales were $1,966,600 upon which the lost profits amounted to $314,656 (MR 184). The award was thus less than half of the lower estimate. Further, as pointed out in respondent's own Petition for Writ of Certiorari filed in this term as No. 823, none of these figures makes any allowance for the ravages of inflation. This case simply does not warrant a nit-picking approach toward isolated minutiae taken out of context of the record as a whole.

On the rate of profit also, petitioners' point (v) relating to alleged errors of arithmetic (Petition 16, 23), the Court of Appeals gave most careful consideration and found it without merit (App 20-22).

The foregoing, in part, forms the basis for petitioners' complaint that there has been no review under the clearly erroneous rule (Petition 17-18 and 23). The District Court, in the first instance, found that the Master's "findings of fact are adequately supported by the evidence" (App 30). Any alleged error arising from the alleged mistakes in arithmetic simply does not withstand scrutiny of the entire record. The Court of Appeals carefully pointed out that the parties were entitled to a real review (App 4), considered in detail the record bearing upon petitioners' complaints (App 6-22) and concluded (App 21-22): "The resulting net profit figure is, then, a composite one, combining arithmetical calculations and value judgments attributable to imprecise factors. . . . It is

improper to isolate individual factors entering into a decision and treat them as controlling considerations."

Similarly, with respect to the complaint as to attorneys' fees (Petition 18-19, 23), a careful review was given and the award was found "adequately supported by documentary evidence" (App 9-10).

The same is true of the effect of the Sherwin Williams settlement which petitioners discuss (Petition 20 and 23). The District Court gave this defense special attention and rejected it on the facts (App 28-29). The Court of Appeals found the facts otherwise than petitioners' naked statement (App 6-8).

Finally, petitioners come to their only question of general interest, that is the issue of treble damages (Petition 20-21, and 23). The Court of Appeals gave careful attention to the authorities and concluded that 15 U.S.C. 15 requires a trebling of the damage award (App 8-9). The Court of Appeals found that the cases present no conflict in need of resolution as the two lines of authority are distinguishable (App 8). Thus, the issue is not ripe for further review in this Court. The Court of Appeals' opinion is fair on its face and is adequate authority for other courts to follow.

REASONS FOR ALLOWANCE OF WRIT

The reasons which petitioners submit for the allowance of writ (pages 22-23) are based entirely upon its one-sided selection of bits and dabs of evidence seeming to support a complaint that it has been wronged. We have shown, we submit, that petitioners' contentions have been

given careful consideration at every stage of the case and have been found unsupportable by the record. We submit that it is not the purpose of the writ of certiorari to provide a third level of review of facts and evidence unless there is some question of public policy which requires guidance to the lower courts.

In short, petitioners' only plea to public interest is that the Court "has not dealt with standards governing the award of damages since *Eastman Kodak* (1927), 273 U.S. 359, *Story Parchment* (1931), 282 U.S. 555, *Bigelow* (1946), 327 U.S. 251, and *Zenith Radio* (1969), 395 U.S. 100 . . ." (Petition 22). Our answer is that these four cases give adequate instructions to the lower courts on the "bread and butter" issues raised in the present petition. One need only glance at the October 1970 issue of Shepards' United States Citations to confirm that the lessons of that line of cases are being currently applied with consistent regularity. In the case at bar, the Court of Appeals followed *Bigelow* and *Zenith* in the opinion under attack (App 11, 12 and 20) and the District Court followed both *Story Parchment* and *Bigelow* in confirming the Master's award (App 27-28).

For the reasons stated, we submit that the petition in No. 871 should be denied.

Respectfully submitted,

CARL HOPPE,

Attorney for Respondents.

CHARLES L. MICHOD,

Of Counsel for Respondents.

LIBRARY
SUPREME COURT, U. S.
FILED
NOV 19 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 871.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,

Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

REPLY IN SUPPORT OF CERTIORARI.

THOMAS V. KOVIKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

November 17, 1970.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0347

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 871.

DAY-GLO COLOR CORP.
(formerly SWITZER BROTHERS, INC.),
ROBERT C. SWITZER
and
JOSEPH L. SWITZER,

Petitioners,

vs.

HARRY P. LOCKLIN and ELMER J. BRANT,
dba RADIANT COLOR COMPANY,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY IN SUPPORT OF CERTIORARI.

Assertions by Radiant—in the hope of escaping review—that the questions presented have been ruled on by the master, the District Court, and the Court of Appeals do not dilute their importance. The very circumstance that they *have been so ruled* gives the questions their compelling importance. They put the antitrust law in turmoil.

It will not do for Radiant (page 2 of Radiant's brief), to divert attention by modifying *Question 1* (whether erroneous damage standards have been applied) and

Question 3 (whether attorney's fees have been improperly as well as extravagantly awarded), by suggesting that they turn on "the record taken as a whole."

These questions *arise on the findings* made by the master, which were adopted *in toto* by the Court of Appeals. The master made clear by his findings *what he took into account and why he decided as he did*—doubtless for the very purpose of permitting easy correction if it should turn out that he was in error in the law he applied.

Nor will it do for Radiant (page 2), to change *Question 4* (concerning the effect of the *settlement* with Sherwin-Williams), to suggest this question concerns the effect of "a *dismissal* [by Radiant of its suit against Sherwin-Williams] without prejudice." It was not a mere dismissal; *it was a settlement*, as indeed Radiant correctly concedes (on page 6) in stating that the problem concerns "the effect of the Sherwin-Williams settlement." But Radiant is in error in suggesting (page 6) "The Court of Appeals found the facts otherwise * * *." The Court of Appeals accepted, here as elsewhere, every finding made by the master. The point is that from these findings no conclusion can follow but that there was *a settlement with Sherwin-Williams*, thus posing the question: Does the settlement have the *same* legal effect in an antitrust case as it would have in any other tort action?

Question 2 (whether the "clearly erroneous" rule has been misconstrued), and *Question 5* (whether antitrust damages must, willy-nilly, regardless of circumstances, be trebled), Radiant concedes (page 2) are correctly stated. They are questions of obvious importance.

These, as well as the other questions, equally have importance far beyond the confines of this single case, as will be apparent upon considering:

1. Damages have been imposed in disregard of findings. The irony is that Judge Miner *refused to find* that antitrust damages to Radiant's business commenced *January 1, 1949*, and adjudged instead that such damages *commenced in 1952 and 1953*. Despite this, damages now are awarded *"commencing January 1, 1949."*

Thus is undone Judge Miner's specific rejection of Radiant's specific request to find damages commenced January 1, 1949. The rejection of that finding Radiant did not assign in the cross-appeal it took in the earlier proceedings.

The result of such disregard of Judge Miner's findings is:

(a) *To waste the eight years of litigation* that went to bring these findings to finality. These issues were fought to the very door of this Court (from February 19, 1954, when Radiant filed its antitrust claim, to April 16, 1962, when this Court denied certiorari, 369 U.S. 851).

(b) *To add $226,992 to the already immense judgment* laid on a small business for a trespass every court that has examined the case has certified was the result of good faith conduct believed to be lawful.

(c) *To undermine all findings* in all litigation.

Why make findings in any case if, as here, they are to serve no purpose in limiting subsequent proceedings in the case?

Findings surely are intended not only to aid review, but to serve the purposes of *res judicata*, as well as to limit subsequent proceedings in the same case.

These purposes, under the decision below, are destroyed.

2. The findings make clear that damages have been awarded for losses not caused by antitrust violation. The master has certified his award *includes* damages for Radiant's own "production and sales problems." (MR p. 140, ¶ 10.)

Worse.

The award treats as antitrust damages, goods *returned by customers because, as the master found, the merchandise was unsatisfactory.* (MR pp. 44-45, ¶ 43; MR p. 89, ¶ 108.) It includes an award of damages *on six categories of nonrelevant items.* (Appendix p. 16.)

In determining damages, each of these categories of improper items was ballooned *by multiplying factors,* thereby adding $275,328 to the judgment.

The result is the more appalling since the owners of the Radiant business "*thought that they weren't being hurt,*" as counsel admitted in explaining why he would not permit them to testify to the damage suffered. (R. 1430.)

For not "being hurt" they now are given $1,145,387.-73.

Reliance on the "estimates" made to serve as proof was, for Radiant, a work of necessity—and will be a revelation to antitrust claimants.

Public interest can hardly be lacking in such a state of affairs in the administration of the antitrust laws.

3. The "clearly erroneous" rule is misapplied where even mistakes in arithmetic are left uncorrected. If every determination were accepted—even to an allowance of antitrust damages for merchandise returned as unsatisfactory—and only mistakes in arithmetic corrected, the profit would be 15%, and not the 16% allowed, and the judgment $58,998 less.

CONCLUSION.

The debris to which the decision reduces the law of damages in antitrust cases should not go unreviewed.

The writ should issue.

Respectfully submitted,

THOMAS V. KOVIKKA,
ARTER & HADDEN,
1144 Union Commerce Building,
Cleveland, Ohio 44115,

SAMUEL W. KIPNIS,
120 South LaSalle Street,
Chicago, Illinois 60603,

THOMAS J. GRAY,
4732 St. Clair Avenue,
Cleveland, Ohio 44103,

Attorneys for Day-Glo Color Corp., Robert C. Switzer and Joseph L. Switzer, Petitioners.

November 17, 1970.